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-21-131

BRIEF OF APPELLANT MAINE COUNTY COMMISSIONERS ASSOCIATION SELF-FUNDED RISK MANAGEMENT POOL

Jeffrey T. Edwards, Esq., Bar No. 679
Preti Flaherty Beliveau & Pachios LLP
P.O. Box 9546, One City Center
Portland, ME 04112
Telephone: 207-791-3000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

Maine County Commissioners Association Self-Funded Risk Management Pool ("Risk Pool") does not dispute that Maine's Freedom of Access Act, 1 M.R.S. §§ 400-414 ("FOAA"), gives the public the right to inspect or copy public records "within a reasonable time of making the request to inspect or copy the public record." 1 M.R.S. § 408-A. The rules also contemplate that what exactly a person is requesting may not always be clear to the agency receiving the request, *see* 1 M.R.S. § 408-A(3), (providing that the agency "may request clarification concerning which public record or public records are being requested"), or may be something that the agency does not have to provide, *see id.* § 408-A(4) (providing for the denial of a request); *id.* § 408-A(4) (stating that an agency "is not required to create a record that does not exist").

If a person takes issue with the agency's response, the rules also provide a specific limited remedy:

> Any person aggrieved by a refusal or denial to inspect or copy a record or the failure to allow the inspection or copying of a record under section 408-A may appeal the refusal, denial or failure within 30 calendar days of the receipt of the written notice of refusal, denial or failure to the Superior Court within the State for the county where the person resides or the agency has its principal office.

1 M.R.S. § 409(1).

In this case, the Human Rights Defense Center ("HRDC") made a request for documents to Risk Pool. Risk Pool immediately responded and provided HRDC with the information that it reasonably believed HRDC wanted. This is not bad faith. And if HRDC was unhappy with Risk Pool's response, then HRDC had to appeal within the 30-day window provided by section 409(1). HRDC did not do so. Because the trial court held otherwise, Risk Pool appeals.

II. FACTS

On May 7, 2021, Samantha Beauvais, HRDC public records manager, requested documents and information under FOAA from Kennebec County, the Kennebec County District Attorney's Office, the Kennebec County Sheriff's Office, and the Kennebec County Correctional Facility. (A-103-04.) In particular, it was a "[r]equest for Settlement Agreement in Afanador v. Kennebec County et al," and other records related to that case. (A-103.) In a letter dated May 20, 2021, Peter Marchesi, counsel for Kennebec County, provided a response that included several documents from the Afanador case, including the complaint, two answers filed by defendants in the case, and a settlement document titled "General Release and Agreement to Defend, Indemnify, and Hold Harmless." (A-105-36.)

On June 16, 2021, Ms. Beauvais wrote to Mr. Marchesi to request clarification of the response, and the parties exchanged several emails. (A-137-38.) Ms. Beauvais explained that "HRDC specifically requested the settlement agreement between Jonathan Afanador (an inmate at KCCF) and Kennebec County, but it was not included in the documents you produced." (A-138.) Ms. Beauvais "reiterate[d] HRDC's request for the settlement agreement." (*Id.*) Marchesi responded that the settlement agreement was in fact included in the response. (A-137.) Ms. Beauvais said "[a]ccording to the Press Herald, there was a $30,000 settlement between Mr. Afanador and Kennebec County (see attached). We are looking for any agreement related to what is reported in the attached article." (*Id.*) Mr. Marchesi responded that "[t]he document provided to you is the only document which contains the terms of the settlement." (*Id.*)

On June 18, 2021, Ms. Beauvais sent a letter to Malcom Ulmer, director of operations for Risk Pool, requesting "documents of payments made to Jonathan Afanador." (A-140-41.) The letter explains that this "includes but is not limited to payment documentation related to the following case: **Afanador v. Kennebec County Case No: 1:20-cv-00235-JDL**[.]" (A-140.) Mr. Ulmer responded on the same day, providing her with the information that he reasonably believed she was seeking, including the $30,000 settlement

amount. (A-143.) Ms. Beauvais clarified that she wanted to see "a copy of the actual agreement that shows $30,000." (A-142.) Mr. Ulmer provided his final response on June 21, stating, "It is my understanding that [Mr. Marchesi] previously provided to you a copy of the signed release. That document is the actual settlement. I have already advised you that the settlement amount is $30,000." (*Id.*) Mr. Ulmer did not attempt to conceal the settlement agreement and was forthcoming about the settlement amount.

On July 2, 2021, the ACLU of Maine, on behalf of HRDC, sent a letter following up on HRDC's request. The letter said that HRDC "believe[d] that Kennebec County's FOAA response thus far is not in compliance with the FOAA," and requested that all documents responsive to the request be provided by July 9. (A-145-47.) The letter did not make any additional request to Risk Pool. Mr. Marchesi confirmed on July 3 that the document already produced was the only document that contained the terms of the settlement, and Mr. Ulmer provided a separate response on July 6 stating that "the signed release provided to [Ms. Beauvais] by [Mr. Marchesi] is the only settlement release document" and that he also "advised [Ms. Beauvais] of the settlement amount." (A-148, 149.)

III. **PROCEDURAL HISTORY**

After engaging in back and forth with both Kennebec County (Mr. Marchesi) and Risk Pool (Mr. Ulmer), HRDC filed an appeal in the Superior Court, Kennebec County, on July 27, 2021. (A-25-36.) HRDC chose to file its lawsuit against Kennebec County and Maine County Commissioners Association ("MCCA"), but not Risk Pool. (*Id.*)

The next day, July 28, 2021, Mr. Ulmer sent an email to HRDC's counsel:

> 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 [MCCA], which is a separate entity). I previously responded to your client, Ms. Beauvais at [HRDC], 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. . . . 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.

(A-93-94.) HRDC's counsel responded that HRDC "named [MCCA], 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 [MCCA] on their website." (A-92.) He further stated that HRDC "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." (*Id.*)

Again on July 28, Mr. Ulmer promptly responded:

> I can't speak to why [MCCA]'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. . . . I am not employed by [MCCA]. . . . 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, 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 to and willing to voluntarily provide said document or information to you. . . . I am also requesting that you voluntarily dismiss your pending legal action against [MCCA], 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 is likely to be resolved to the extent you and your client request additional documents or information that actually exist and are likely subject to disclosure under FOAA.

(A-91-92.)

HRDC's counsel responded that HRDC was:

> 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-91.)

Several months later, on October 1, 2021, HRDC moved to amend its complaint to add Risk Pool as a defendant, which the trial court granted on October 25. (A-3, 38-41.) Risk Pool filed a motion to dismiss, arguing that HRDC's FOAA claim against Risk Pool was filed after the deadline to appeal established by 1 M.R.S. § 409(1). (A-4, 70-72.) The trial court (*Billings, J.*) denied the motion to dismiss on April 22, 2022. (A-8-12.) Although the trial court acknowledged that Risk Pool was added outside the statutory deadline, it held that HRDC's amended complaint related back to the filing of the original complaint. (*Id.*)

Following a period of discovery, an evidentiary hearing was held on September 29, 2022, where the trial court heard testimony from Paul Wright, executive director of HRDC, and from Mr. Ulmer. (A-5.) After the hearing, on December 1, 2022, the court issued its Decision and Order. (A-13-24.) The trial court concluded that the FOAA request was timely. (A-16-18.) The court also explained its interpretation of HRDC's FOAA request and its

determination that Risk Pool failed to adequately respond and acted in bad faith. (A-18-23.)

Risk Pool filed a motion for amended findings of fact, which the trial court denied on February 6, 2023. (A-7.) Risk Pool then timely appealed to this Court. *See* M.R. App. P. 2B(c)(1), (2).

IV. ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in finding that HRDC's amended complaint—filed months after the "strictly construed" deadline for appeal—could "relate back" to the original filing date?

2. Did the trial court err in finding that Risk Pool could not challenge the timeliness of HRDC's appeal based on new evidence presented at the evidentiary hearing?

3. Did the trial court err in finding that Risk Pool acted in bad faith where Risk Pool reasonably believed it provided HRDC with the information HRDC was seeking?

V. ARGUMENT

A. The trial court erred in ruling that HRDC's FOAA appeal was timely.

Maine's FOAA law provides that a person aggrieved by a refusal or denial can appeal to the Superior Court, but the appeal must be filed "within 30 calendar days of the receipt of the written notice of refusal, denial or

failure." 1 M.R.S. § 409(1). The court "strictly construes" the time limit for filing an appeal, "requiring dismissal if the appeal is untimely even if a plaintiff could make another request for information and reinitiate court proceedings." *Bangor Pub. Co. v. University of Maine System*, No. CV-95-223, 1995 WL 18036704, at *1–2 (Me. Super. Sep. 14, 1995). *See also Guy Gannett Publ'g Co. v. Maine Dep't of Pub. Safety*, 555 A.2d 474, 476 (Me. 1989) (dismissing appeal filed twelve days beyond FOAA deadline, reasoning that a strict application of the plain language of the statute was required). In this case, the trial court erred in determining that HRDC's appeal was timely with respect to Risk Pool.

1. The trial court erred in finding that HRDC's amended complaint—filed months after the "strictly construed" deadline for appeal—could "relate back" to the original filing date.

The trial court agreed that HRDC's action against Risk Pool fell "squarely outside the statutory deadline." (A-8-9.) Nevertheless, the court denied Risk Pool's motion to dismiss, holding that HRDC's amendment related back to the date of the original pleading. (A-12.) This was error.

"'[A] new defendant cannot normally be substituted or added by amendment after the statute of limitations has run.'" *Wilson v. U.S. Gov't*, 23 F.3d 559, 563 (1st Cir. 1994) (quoting *Worthington v. Wilson,* 8 F.3d 1253, 1256 (7th Cir. 1993)). There is an exception which allows an amendment of a pleading to "relate[] back" to the date of the original pleading, but only where:

> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the condition of paragraph (2) of this subdivision is satisfied 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).

The court found that subparagraph (3) was "relevant to this case," the question being "whether the Risk Pool 'knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against that party.'" (A-10.) The court erred by concluding that the requirements of subparagraph (3) were met here.

First, subparagraph (3) requires that there be "a mistake concerning the identity of the proper party." M.R. Civ. P. 15(c)(3)(B). Where there has been no such mistake, the amendment does not relate back. *See Garland v. Sherwin*, 2002 ME 131, ¶ 8, 804 A.2d 354 ("A

conscious choice to sue one party rather than **a**nother, or a lack of knowledge of who is the correct defendant, is not a mistake concerning the identity of the proper party.") (quotation marks omitted). *See, e.g.*, *Wilson*, 23 F.3d at 563 ("In this case, there was no 'mistake concerning the identity of the proper party,' as required by Rule 15(c)(3). Rather, Wilson 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. We have no doubt that Rule 15(c) is not designed to remedy such mistakes.").

HRDC originally brought its complaint against Kennebec County and MCCA, but not Risk Pool. (A-25.) The Legislature provided for the establishment of public self-funded risk pools under Title 30-A, Chapter 117, and Risk Pool was established by contract pursuant to 30-A M.R.S. § 2253. Whether it is formed as a "body corporate" or not, Risk Pool has certain powers, including to "[s]ue or be sued." 30-A M.R.S. § 2253(7)(A). Risk Pool is a separate legal entity, even if not separately incorporated.

HRDC was obviously aware that Risk Pool was a separate entity before it filed its original complaint on July 27, given that it had sent a separate FOAA request to Risk Pool and received a separate response from Mr. Ulmer. Indeed,

the evidence before the trial court was that HRDC knew at the time it sent its FOAA request to Risk Pool that Risk Pool was distinct. After being asked why HRDC sent a request to Risk Pool, Mr. Wright explained:

> After the exchange of documents with - - of e-mails and the receipt of documents from Mr. Marchesi, I thought that maybe there was some type of semantic or word game being played, where maybe technically Kennebec County didn't have the documents but another agency did. And so it looked like the Risk Pool would be that agency and so, therefore, we decided to submit the request to them to see if they in fact had the documents we were seeking.

Sept. 29, 2022, Hearing Tr. at 62.

Moreover, the evidence shows, and the trial court specifically found, that Mr. Ulmer had informed HRDC's counsel that MCCA and Risk Pool were distinct by July 28—the day after HRDC filed its original complaint. (A-11, 91-92.) Mr. Ulmer was clear that MCCA was "a separate entity from the Risk Pool"; that "it isn't involved in the operations of the Risk Pool"; and that MCCA had a "lack of involvement in this matter" (A-91-92). HRDC then waited more than two months (i.e., an additional 60+ days, which is twice the statutory appeal period) to bring Risk Pool into this action. That being so, there has been no "mistake" as contemplated by subparagraph (3).

Second, even if it could be found that HRDC made a mistake, there is no evidence that Risk Pool knew or should have known that, but for that mistake, the action would have been brought against Risk Pool instead. As explained above, the record clearly reflects that Mr. Ulmer immediately put HRDC on notice of the fact that Risk Pool and MCCA were separate legal entities. Even if Mr. Ulmer was aware of the filing of the lawsuit, it is by no means clear that he would understand that HRDC meant to file against Risk Pool in these circumstances—where HRDC knew that Risk Pool was a separate entity at least as early as one day after filing its complaint, but then failed to involve Risk Pool in the litigation for months.

Given the evidence in the record, the complaint as to Risk Pool does not relate back. Because HRDC's appeal against Risk Pool was outside the statutory deadline, the trial court erred in finding that HRDC's appeal was timely, and HRDC's amended complaint should have been dismissed.

2. The trial court erred in finding that Risk Pool could not challenge the timeliness of HRDC's appeal based on new evidence presented at the evidentiary hearing.

Even if "relation back" was appropriate—which, as explained above, it is not—HRDC's appeal against Risk Pool would still be untimely. The time

period for appealing a FOAA refusal or denial runs from the date "of the receipt of the written notice of refusal, denial or failure." 1 M.R.S. § 409(1). The FOAA laws further provide that "written notice of the denial" must be provided "within 5 working days of the receipt of the request." 1 M.R.S. § 408-A(4). In this way, the statutory scheme is meant to expedite responses and require expeditious appeals. The notice that the agency provides within the 5 working days of the request is the notice that starts the clock under section 409(1). Were the rule otherwise, a requesting party could continue to send follow up correspondence to the agency related to a request, ostensibly for years, even if the agency earlier denied the request, and indefinitely extend the deadline to appeal, rendering the 30-day deadline in the statute meaningless. *See Schaefer v. State Tax Assessor*, 2008 ME 148, ¶ 13, 956 A.2d 710 (This Court "do[es] not construe a statute in a way that renders portions of it meaningless").

Risk Pool received HRDC's FOAA request on June 18, 2021. (A-140-44.) Mr. Ulmer responded the same day (A-143), and the undisputed evidence is that he had responded to the request as much as he was going to by June 21, 2021 (Sept. 29, 2022, Hearing Tr. at 101)—consistent with section 408-A(4)'s requirement that the agency respond within 5 days of receipt of the request. HRDC then had 30 calendar days to appeal, but did not file its complaint

against Kennebec County and MCCA in this case until July 27, 2021, and did not attempt to amend its complaint to add Risk Pool as a defendant until October 1, 2021. The appeal was untimely. *See* 1 M.R.S. § 409(1).

The June 18, 2021, FOAA request is the only request at issue—HRDC's complaint only mentions one FOAA request and only brings one Count against Risk Pool for its failure to disclose. (A-64-65, 67.) The evidence at trial from Mr. Wright was that there was only one FOAA request to Risk Pool.

> Q. And would you agree with me that the one and only FOAA request served by the HRDC on the Risk Pool was the June 18, 2021, e-mail, which has also been marked I believe as exhibit – Exhibit 9?
> A. Yes.
> Q. And would you agree with me based upon Exhibit 10 Mr. Ulmer had responded to that request as much as he was going to respond by June 21, 2021?
> A. Yes, it looked like he was done responding.

Sept. 29, 2022, Hearing Tr. at 100-01.

While HRDC could have made additional FOAA requests to Risk Pool and appealed them, it did not do so. The July 2 letter was not a separate request. It was merely a follow up letter from HRDC's lawyer "writing to follow up on emails exchanged . . . concerning [HRDC's] public records request." (A-145; *see also* A-65 (complaint characterizing July 2 letter as a "confirmation letter").) Any assumptions that the trial court made regarding the July 2 letter in order to find the appeal timely were unsupported by the

record and improper.[1] Indeed, this Court has previously rejected such arguments. In *Guy Gannett Publishing Company. v. Maine Department of Public Safety*, for example, the Court concluded that a FOAA appeal should have been dismissed as untimely, reasoning that

> The Superior Court's rationale for hearing the case on the merits, based as it was on notions of judicial economy, overlooks the plain language of the statute. Moreover, the Superior Court's conclusion is based on a string of assumptions that after dismissal Gannett would make a second request for information, that the agency would refuse to make the information available, and that Gannett would start another court proceeding. All three events will by no means necessarily follow a dismissal. It is not for us to speculate on the future action and interaction of the parties.

555 A.2d 474, 476 (Me. 1989).

Because Risk Pool provided its written denial by June 21, 2021, the 30-day deadline for appeal began to run from that date. HRDC's appeal, even if it related back to July 27, was untimely and should have been dismissed.

In its Decision and Order, the trial court incorrectly held that Risk Pool could not make this timeliness argument—which was based on the admissions of HRDC's witness revealed at trial—because Risk Pool was estopped from asserting anything different from what it had said in its initial

[1] The court stated that it "has already held, at the Risk Pool's urging, that Attorney Heiden's letter was a second FOAA request." (A-18.) To the extent the court engaged in fact finding in deciding the motion to dismiss, this was improper. Risk Pool also notes that the court's order on the motion to dismiss apparently found that "there is only one FOAA request at issue here." (A-10.)

motion to dismiss briefing. (A-16-18.) *See State Tax Assessor v. TracFone Wireless, Inc.*, 2022 ME 36, ¶ 17 n.6, 276 A.3d 521 (the doctrine of judicial estoppel generally "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.") (quotation marks omitted).

Risk Pool cannot be bound by the way it presented the facts in its motion to dismiss. In fact, for purposes of that motion, the specific dates from which the statutory appeal period ran were immaterial—regardless of the particular date on which the 30-day deadline began to run, the amended complaint, filed *more than 60 days* after the original complaint, was clearly untimely. In any case, at that early stage in the proceedings, Risk Pool's papers were guided by HRDC's allegations, *see Argereow v. Weisberg*, 2018 ME 140, ¶ 2, 195 A.3d 1210 (on a motion to dismiss, plaintiff's alleged facts are taken as true and viewed in the light most favorable to plaintiff); and it did not have the benefit of the evidentiary hearing, *see, e.g.*, Sept. 29, 2022, Hearing Tr. at 100-01 (Mr. Wright testifying that there was only one FOAA request and that Risk Pool had provided its final response by June 21). A defendant cannot be bound in later stages of litigation by facts recited in a motion to dismiss given that

allegations in the complaint are presumed to be true and viewed in the light most favorable to the plaintiff. The trial court's decision after the hearing should have been based on the evidence presented at that hearing, not mere allegations in HRDC's complaint or argument in Risk Pool's motion to dismiss.

Considering this procedural posture, the rendition of the facts by a party in a motion to dismiss cannot be estoppel as to the facts recited in the motion. *See, e.g.*, *Lighthouse Imaging, LLC v. OneBeacon Am. Ins. Co.*, No. 2:13-CV-237-JDL, 2014 WL 12726313, at *8–9 (D. Me. June 25, 2014) (judicial estoppel not applicable where "[t]he motion to dismiss addressed the merits of some of the claims in the underlying action, as they were pleaded, on the basis of very different legal principles"). This principle is reflected in the rules related to motions for summary judgment, which make clear that "facts admitted by the parties solely for the purpose of the summary judgment motion shall have no preclusive effect at trial." M.R. Civ. P. 56(d). *See, e.g.*, *Toto v. Knowles*, 2021 ME 51, ¶ 15, 261 A.3d 233.

Further, judicial estoppel does not apply where Risk Pool was not successful in its motion to dismiss. "[C]ourts have uniformly recognized that [the] purpose [of judicial estoppel] is to protect the integrity of the judicial process." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quotation marks omitted). "Absent success in a prior proceeding, a party's later inconsistent

position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity." *Id.* at 750–51 (citations and quotation marks omitted).

Here, Risk Pool moved to dismiss HRDC's complaint as untimely, given that it was filed months after the statutory deadline for appeal, and that request was denied. *See* A-12 (concluding simply that "HRDC's amended complaint adding the Risk Pool as a party relates back to the filing date of the original complaint. The Risk Pool's motion to dismiss HRDC's FOAA appeal as untimely is therefore DENIED."). Whether there was a second FOAA request was immaterial to the court's conclusion, and it cannot be said that Risk Pool benefitted in any way where the motion was unsuccessful. *See, e.g.*, *State Tax Assessor v. TracFone Wireless, Inc.*, 2022 ME 36, ¶17 n.6, 276 A.3d 521 ("There is no indication that the PUC's order granting TracFone's ETC status was predicated on it being a prepaid service, meaning, at the very least, that TracFone gained no unfair advantage due to any change in its position."); *Lovell v. Lovell*, 2020 ME 139, ¶ 6, 243 A.3d 887 ("Paul was not estopped from claiming that part of the IRA was marital property because he did not benefit from the ruling that concluded the Prudential IRA was nonmarital property. As a result of the determination at the earlier proceeding, it was Dorothy—not Paul—who was able to receive the entirety of the $451,000 IRA.").

Accordingly, the trial court erred by concluding that Risk Pool was estopped from arguing that HRDC's appeal was untimely based on evidence at the hearing. Based on the evidence, HRDC's appeal, even if hypothetically filed as to Risk Pool on July 27, was untimely as to Risk Pool because the 30-day appeal deadline began to run from Risk Pool's written notice of refusal, denial or failure on June 21. *See* 1 M.R.S. § 409(1).

B. The trial court erred in ruling that the Risk Pool acted in bad faith.

Because HRDC's appeal should have been dismissed as untimely, this Court need not address the issue of bad faith. However, if it does so, the trial court's ruling on this issue was erroneous. HRDC had the burden to demonstrate that Risk Pool acted in bad faith, and the trial court erred in determining that HRDC met that burden here. *See Cent. Maine Healthcare Corp. v. Maine Bureau of Ins.*, No. BCD-AP-13-03, 2014 WL 3824324, at *20 (Me. B.C.D. July 29, 2014) (requesting party has the burden to demonstrate bad faith on the part of the agency). "In reviewing whether a government entity complied with FOAA, [this Court] review[s] the trial court's factual findings for clear error and its interpretation of FOAA de novo." *Fairfield v. Maine State Police*, 2023 ME 12, ¶ 9, -- A.3d --.

First of all, the trial court appears to have grounded its bad faith determination in part on objections to Risk Pool's timeliness arguments. *See,*

e.g., A-22 ("Even without a clear standard for bad faith, it is clear that taking baseless positions or otherwise abusing the legal processes is bad faith under most circumstances."). As discussed above, HRDC's appeal was in fact untimely. But even if this Court disagrees with Risk Pool, the timeliness issue is a legitimate good faith dispute. This Court has repeatedly enforced the statutory deadline to file a FOAA appeal and has "strictly construed" such deadlines. It was entirely appropriate for Risk Pool to make timeliness arguments here, and because those arguments have merit, the trial court's finding of bad faith was clearly erroneous.

Next, an agency may interpret a FOAA request differently than the person making the request, or even differently than a trial court reviewing the request and response, but that does not mean that the agency has acted in bad faith. In those circumstances, the law provides a specific remedy—appeal to the Superior Court pursuant to section 409(1). The Superior Court may then determine that the denial or refusal "was not for just and proper cause," in which case it "shall enter an order for disclosure." 1 M.R.S. § 409(1). This is not uncommon. Separately, the court "may award reasonable attorney's fees and litigation expenses," but only "if the court determines that the refusal . . . was committed in bad faith." 1 M.R.S. § 409(4). Thus, a trial court's determination that public records must be disclosed because the refusal was

not for just cause renders the person a prevailing party, but it does not mean that the agency acted in bad faith. *See, e.g.*, *Cent. Maine Healthcare Corp.*, 2014 WL 3824324, at *20 (stating that "[t]he fact that the court, after a *de novo* trial, disagrees with the Bureau's assessment of the confidentiality of five of the 76 pages of withheld documents," does not change its conclusion that it had not been shown that the Bureau acted in bad faith); *Lawson v. Town of Tremont*, No. BCD-CIV-2022-00030, 2022 WL 2819515, at *2 (Me. B.C.D. July 08, 2022) (although determining that most of the documents at issue had to be disclosed, the court held that "this course of conduct does not amount to bad faith"). Something more than a determination that the documents ought to have been disclosed is required.

The trial court noted that there was no clear standard for what constitutes bad faith. "If the plain language of a statute is ambiguous—that is, susceptible of different meanings—[this Court] will then go on to consider the statute's meaning in light of its legislative history and other indicia of legislative intent." *MaineToday Media, Inc. v. State*, 2013 ME 100, ¶ 6, 82 A.3d 104. In 2009, the Legislature amended Maine's FOAA laws to allow a court to award attorney fees in successful FOAA appeals. *See* P.L. 2009, ch. 423. These attorney fee provisions had been contemplated by earlier proposed bills as the Legislature worked through issues such as whether the failure to comply

had to be committed in bad faith. Although it did not pass, the summary of a related bill proposed in the 122nd Legislature, LD 466, provides some guidance on what bad faith means in the FOAA context. *Cf. Bowler v. State*, 2014 ME 157, ¶ 11, 108 A.3d 1257 (statement of fact accompanying an adopted amendment to a bill that included what became the statute at issue supported the Court's interpretation). It provides:

> [T]he failure to comply with the law and the denial of access must have been committed in bad faith. Being unsure whether a requested record is a public record is not sufficient to rise to the level of bad faith nor would a legitimate, but mistaken, belief that the record requested is confidential.

Similarly, debate in the legislative record on the bad faith issue, even where related to amendments that did not ultimately pass, provides context for how to interpret section 409(4). For example, in considering An Act to Allow a Court to Award Attorney's Fees in Successful Freedom of Access Appeals, Representative Priest stated that bad faith "means there's not a mistake. That means it's a deliberate attempt to withhold something, which this Legislature has again and again and again said you should not withhold." 2 Legis. Rec. H-623 (1st Reg. Sess. 2009).

In this case, the trial court heard testimony that Risk Pool had provided HRDC with what it interpreted the request as seeking. *See, e.g.*, Sept. 29, 2022, Hearing Tr. at 115 (Mr. Ulmer testified that "[w]e advised them of the

payment amount, that was the interpretation of what they were seeking based on our review of the [FOAA] request and that was I think provided within a few hours of when the request came in."). There was further evidence that, as clarified, Risk Pool interpreted the request as seeking a specific document that did not exist. The following exchanges makes this clear:

> Q. What did you interpret [the] request from her as asking for?
> A. That she thought that there was some kind of an underlying agreement between the parties, perhaps some sort of a - - like a summary document or something signed by the parties.
> Q. Did the parties to the Afanador/Kennebec County settlement ever execute an underlying written settlement agreement?
> A. No.
> Q. Do you have such a document anywhere in your file?
> A. No.
> . . .
> Q. And did you authorize contact with Attorney Heiden prior to your deposition of December 15, 2021, to determine exactly what document or documents HRDC was requesting from the Risk Pool?
> A. Yes.
> Q. And what was your understanding of the response to that inquiry from Mr. Heiden on behalf of HRDC?
> . . .
> A. That he wanted a document showing that Kennebec County agreed to pay Afanador $30,000.

Sept. 29, 2022, Hearing Tr. at 135, 140.

This is likewise reflected in the email exchanges in the record. As the parties attempted to clarify what was being sought, Ms. Beauvais would say things like "[w]e are looking for *any agreement*" related to the $30,000

amount. (A-137 (emphasis added).) After giving Ms. Beauvais the settlement amount and settlement release and informing HRDC that no other written settlement agreement existed, it was Mr. Ulmer's impression that HRDC's "inquiry was resolved and that no further was required by the Risk Pool." (A-87.) Nevertheless, he still indicated his willingness to help in good faith if there was something more HRDC was after—even after the lawsuit was filed—stating "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" (*id.*), and "if there is a specific document or specific other information that you are seeking . . . 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 to and willing to voluntarily provide said document or information to you" (A-85).

HRDC responded that it was

> 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-91.)

If there existed a written document evidencing Kennebec County's agreement to pay $30,000 in the *Afanador v. Kennebec County* case, and Risk Pool possessed that document and refused to produce it or claimed that it did not exist, this could possibly be construed as bad faith. But this is not that case. Nor was Risk Pool keeping any requested information secret—Mr. Ulmer provided the information that he believed HRDC was seeking. The trial court's conclusion that Mr. Ulmer denied the existence of responsive documents is flatly wrong. (A-22.) Rather, Risk Pool justifiably interpreted this as a targeted request for what turns out to be a non-existent settlement agreement. There is only a release. HRDC was advised by Kennebec County that no such document existed and HRDC ultimately voluntarily dismissed its appeal against Kennebec County and MCCA. (A-4.) Mr. Ulmer offered for HRDC to identify the particular documents that it was seeking. Risk Pool does not dispute that, had the request been for other existing public records, such documents would have been disclosed. *See* Sept. 29, 2022, Hearing Tr. at 144 (Mr. Ulmer testified that "If the request is for a cancelled check, we would have - - would have provided that."). Because no one questioned that the settlement amount was in fact $30,000—a publicly reported fact which Mr. Ulmer confirmed—he did not understand the request to seek a copy of a canceled check which merely documented the information he confirmed prior to any litigation.

The trial court, with the benefit of the entire record and argument of counsel, could have interpreted HRDC's request as seeking documents beyond what it received from Risk Pool. While Risk Pool would disagree, in such a case, an order for disclosure would be appropriate. 1 M.R.S. § 409(1). However, Mr. Ulmer's legitimate belief that he had provided to HRDC what it had requested (a belief reflected in several of his contemporaneous communications with HRDC)—even if ultimately mistaken—was not bad faith. The trial court's interpretation of FOAA's bad faith provision and its application of the provision to this case was error.

VI. CONCLUSION

Risk Pool respectfully requests that this Court vacate the trial court's decision.

Dated at Portland, Maine this 15th day of March, 2023.

Jeffrey T. Edwards, Esq. (Bar No. 679)
Counsel to Maine County Commissioners Association Self-Funded Risk Pool
Preti Flaherty Beliveau & Pachios LLP
P.O. Box 9546, One City Center
Portland, ME 04112
Telephone: 207-791-3000

VII. CERTIFICATE OF SERVICE

I, Jeffrey T. Edwards, Attorney for Maine County Commissioners Self-Funded Risk Management Pool, certify that I have, this date, served the Appellant Brief to the attorneys listed below.

Carol J. Garvan (Maine Bar No. 4448) Zachary Heiden (Maine Bar No. 9476) Anahita D. Sotoohi (Maine Bar No. 10120) Attorneys for Human Rights Defense Center American Civil Liberties Union of Maine Foundation PO Box 7860 Portland, Maine 04112 cgarvan@aclumaine.org zheiden@aclumaine.org asotoohi@aclumaine.org	

Dated: March 15, 2023

PRETI, FLAHERTY, BELIVEAU,
& PACHIOS, LLP
One City Center
P.O. Box 9546
Portland, ME 04112-9546
Tel: 207-791-3000
Fax: 207-791-3111