

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
Civil Action
Docket No. _____

MTM ACQUISITION, INC. d/b/a Portland)
 Press Herald/Maine Sunday Telegram, a)
 Maine corporation with a primary place of)
 business in South Portland, Maine.)
)
 Plaintiff/Appellant,)
)
 v.)
)
 STATE OF MAINE, a state government)
 with a primary place of business in Augusta,)
 Maine)
)
 Defendants/Appellees.)
)
)

**APPEAL FROM DENIAL OF ACCESS
TO PUBLIC RECORDS
(1 M.R.S. § 409(1))**

MTM Acquisition, Inc. d/b/a *Portland Press Herald/Maine Sunday Telegram* (the “*Press Herald*”) appeals the denial of access to public records by the Maine State Police, an instrumentality of the State of Maine, pursuant to 1 M.R.S. § 409(1) as follows:

CASE SUMMARY

1. This is a challenge to the decision by the Maine State Police to keep secret public records imposing discipline on law enforcement officers and other employees in violation of the Freedom of Access Act (“FOAA”) and the state employee personnel records law, 5 M.R.S. § 7070(2)(E). To inform Mainers about how the State Police addresses its officers’ misconduct, the *Press Herald* submitted a FOAA request for final disciplinary records and settlements, which are public under 5 M.R.S. § 7070(2)(E). The Maine State Police responded by producing approximately 80 pages of records, many of which contained unexplained redactions. In response to the *Press Herald*’s request for such an explanation, the Maine State Police cited two

statutory provisions and asserted the incredible proposition that revealing which records were redacted under which provision would itself disclose information excepted by the FOAA. Worse still, the Maine State Police withheld entirely—without informing the *Press Herald*—final disciplinary records that were referenced in the very documents it produced. The public is entitled to this information. The *Press Herald* requests an order of disclosure, an order that the State Police conduct an adequate search for the requested public records, an order that the State Police disclose an exceptions log, attorneys’ fees, and costs, pursuant to 1 M.R.S. § 409(1) and other law.

PARTIES AND JURISDICTION

2. MTM Acquisition, Inc. is a Maine corporation in good standing with its principal place of business in South Portland, Maine. MTM Acquisition, Inc. publishes the *Portland Press Herald/Maine Sunday Telegram* in print and online at www.pressherald.com. The *Press Herald* is the flagship daily newspaper of Maine’s largest news-gathering organization.

3. The State of Maine is a sovereign state with a capital in Augusta, Maine. The executive branch of Maine includes the Department of Public Safety. A Bureau within the Department is the Maine State Police, which is headquartered in Augusta, Maine.

4. The Superior Court has jurisdiction over this action pursuant to 1 M.R.S. § 409(1) and other applicable law.

5. Venue is proper in Cumberland County pursuant to 14 M.R.S. § 105(1) and other applicable law.

PRIORITY OF FOAA APPEAL

6. This FOAA case has statutory priority such that it “may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require” pursuant to 1 M.R.S. § 409(1).

RIGHT TO COPY STATE POLICE DISCIPLINARY RECORDS UNDER FOAA

7. The purpose of the FOAA is to promote transparency in government by, among other things, making records of the transaction of governmental business “open to public inspection.” 1 M.R.S. § 401.

8. The Legislature declared that the FOAA “shall be liberally construed and applied to promote its underlying purposes and policies” 1 M.R.S. § 401.

9. Under Maine law, “a corollary to such liberal construction of the Act, is necessarily a strict construction of any exceptions to the required public disclosure.” *Guy Gannett Pub. Co. v. Univ. of Maine*, 555 A.2d 470, 471 (Me.1989), quoting *Moffett v. City of Portland*, 400 A.2d 340, 348 (Me. 1979).

10. The FOAA guarantees to every person the right to request that an agency make public records available for inspection and copying. 1 M.R.S. § 408-A.

11. The burden of proving “just and proper cause for the denial of a FOAA request” falls on the public agency denying the request. *MaineToday Media, Inc. v. State of Maine*, 2013 ME 100, ¶ 9, 82 A.3d 104.

12. If a court, after trial *de novo* “with taking of evidence and other testimony as determined necessary” determines that a refusal to permit inspection and copying “was not for just and proper cause, [it] shall enter an order for disclosure.” 1 M.R.S. § 409(1).

13. Because of the compelling public interest in keeping a watchful eye on how public agencies police themselves and their employees, the Maine Legislature made public all final decisions imposing discipline on public employees. “If 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.” 5 M.R.S. § 7070(2)(E). The statute reflects a core principle of representative democracy that with public service comes public accountability.

14. The interest in public access to public employee disciplinary decisions is particularly compelling when the employees in question are law enforcement officers vested with great public authority, including the power to make arrests, detain citizens, and use force. Public awareness of whether law enforcement agencies are engaged in effective oversight and discipline of officers serves as a vital check on police corruption and misconduct—an interest at the core of what FOAA is all about.

FACTS

15. In February 2020, *Press Herald* Staff Writer Matt Byrne submitted a FOAA request to the Maine State Police for records of final written decisions of discipline involving sworn and unsworn personnel over the period 2018-2019.

16. Ten months later, on December 30, 2020, the State Police responded with a batch of records, “the PPH records,” totaling 11 pages of documents.

17. In his dealings with the State Police described here, Byrne acted for and on behalf of the *Press Herald*, where he is employed.

18. On January 15, 2021, Byrne submitted a second request to the State Police for any records provided to the *Bangor Daily News* (“BDN”). Later that day, the Maine State Police provided those records, “the BDN records,” totaling 55 pages contained in two documents. The

BDN records apparently encompassed the time period of the PPH request of 2018 and 2019, plus older records stretching to 2015 and more recent documents dated 2020. The BDN records also contained documents that appeared responsive to Byrne’s original PPH request from the time period of 2018 and 2019 that had not been previously provided.

19. For instance, in the PPH records, there is a final written decision of discipline for Sgt. Elisha Fowlie outlining a 30-day suspension that was later modified. Yet, the BDN records contain an agreement between the Maine State Police and The Maine State Troopers Association regarding the same disciplinary case involving Sgt. Fowlie that was not provided in the PPH documents.

20. Then, on January 22, 2021, the State Police provided an additional document dated July 29, 2020, which the State Police said was responsive to the request for the BDN records. This record related to disciplinary measures in the case of Cpl. Thomas Fiske. With this latest document in hand, the time period of the BDN request appears to be 2015 to some point in 2020, with the latest dated document provided being in July of 2020.

I. FOAA Request for Disciplinary Records and Settlement Agreements

21. On February 2, 2021, Byrne made what he described as a “new, unifying request under FOAA [to] end whatever interplay or difference there may be between [his] previous request for two years of records, and the BDN request, which was more expansive.” This is the FOAA request at issue in this litigation and it is attached as **Exhibit A**.

22. In this FOAA request to the State Police, Byrne requested that the State Police provide:

- A. records of final discipline for sworn employees or former employees of the Maine State Police dated between Jan. 1, 2015 and ending July, 2020;
- B. any settlement documents between employees or former employees, dated between

Jan. 1, 2015 and July, 2020; and

- C. a privilege log or so-called Vaughn index, for any redacted or withheld records responsive to items 1 and 2; this should specify the specific exception that is relied upon as the basis for not disclosing or redacting any specific record.

See Exhibit A.

- 23. The State Police acknowledged receipt of the FOAA request that day, February 2.

See Exhibit B.

24. In response to a request for clarification by the State Police also received on February 2, Byrne agreed to limit the time frame of the request to exclude May 30 and 31 and all of June 2020 in order to match the timeframe of the prior BDN records request. The *Press Herald* did so because the State Police indicated that the expanded timeframe would have required “additional work . . . to determine whether there are any responsive records that were issued during that approximately 32-day timeframe” not covered by the BDN’s prior request. *See*

Exhibit C.

II. Unlawful Redactions in Response to FOAA Request

25. On February 11, 2021, the State Police responded to the *Press Herald’s* February 2 request with 83 pages of records referring to 22 law enforcement officers or employees subject to discipline ranging from warnings to lengthy suspensions.

26. With respect to 13 of the officers subject to discipline (60%), specifics about the misconduct giving rise to discipline or other substantive information was either redacted or described in terms too vague to provide meaningful information about the particular conduct that gave rise to discipline. The lack of detailed information reflects the fact that in many instances the final disciplinary records remain unproduced. Several examples of these problems follow.

- 30. The Agreement imposing discipline on Trooper David Coflesky says that he

operated a motor vehicle under the influence of alcohol in Vermont and identified himself as a Maine State Trooper during the investigation into his actions, yet the Agreement includes extensive redactions, including all of Paragraph 6, as follows:

6.



31. Another disciplinary record in which significant information was redacted is the Agreement imposing final discipline on Trooper Christopher Gay. Paragraph 5 of the Agreement is redacted, as follows:

5. The State agrees to



a paper suspension,



but the suspension shall be considered as a disciplinary suspension under the Collective Bargaining Agreement in all ways except as provided in paragraph 6.

32. Another disciplinary record in which significant information was redacted is the Agreement imposing final discipline on Cpl. Kyle Pelletier. Paragraph 4 of the Agreement is redacted, as follows:

4. The Maine State Police will close the Professional Standards case IA 2019-009 as sustained.



This is a violation of our Code of Conduct policy (E-24) and Vehicle Use policy (E-80).

33. Another disciplinary record in which significant information was redacted is the Agreement imposing final discipline on Sgt. Elisha Fowlie. Paragraph 4 of the Agreement is

redacted, as follows:

4. The Maine State Police will close the Professional Standards Investigation as sustained.

This is a violation of our Code of Conduct policy (E-24) and Chain of Command policy (E-12).

III. Unlawful Omissions in Reponse to FOAA Request

34. In at least four instances (concerning David Coflesky, Andre Paradis, Bryan Creamer, Christopher Rogers), a Settlement Agreement related to final discipline references or incorporates separate final disciplinary records by the State Police, yet those final disciplinary records were not disclosed in response to the *Press Herald's* FOAA request, without explanation.

35. For example, the Settlement Agreement related to discipline imposed on Trooper Paradis says, "The final discipline will be as outlined in the final disciplinary letter." But the letter was not provided to the *Press Herald*. The same Agreement says, "Both parties agree to the following stipulations in addition to the final discipline imposed in IA2016-074." But no record of the final discipline imposed in IA2016-074 was disclosed even though the Agreement says, "The Maine State Police will close Office of Professional Standards Case IA2016-074 as [s]ustained." As mentioned above, the Agreement itself discloses no meaningful information about the conduct that gave rise to the discipline imposed on Trooper Paradis.

36. The Settlement Agreement related to discipline on Trooper Creamer is another example of an Agreement that references final documents imposing discipline that were not disclosed. The Agreement says, "The Maine State Police will close Office of Professional Standards Case IA2016-078 as sustained." But the State Police disclosed no record of final

discipline imposed in IA2016-078. And the Agreement itself contains only the conclusory statement that Trooper Creamer “failed to properly investigate a domestic violence complaint.” The Agreement contains no other information about the conduct that justified the conclusion that any investigation was improper. Nor is there any information detailing whether the improper investigation interfered with a prosecution or resulted in harm to the victim.

37. In some instances, the State Police disclosed only a Settlement Agreement imposing discipline, but no Record of Employee Discipline, a form used by the State Police’s Office of Professional Standards that, in other circumstances, was disclosed alongside an Agreement. The State Police have provided no explanation for why it would have Agreements imposing discipline, but no Records of Employee Discipline associated with those Agreements. Instead, the record production appears to be incomplete.

38. For example, with respect to Trooper David Coflesky, the State Police disclosed an unsigned and heavily redacted Agreement referring to disciplinary actions taken against him. The Agreement says: “Both parties agree to the following stipulations in addition to the final discipline imposed in IA2016-020.” However, the State Police did not disclose the additional referenced record of final discipline imposed in IA2016-020.

39. Another indication that the State Police have other more specific records describing final disciplinary action in addition to records that were provided is that in several instances the provided records are too vague to provide meaningful information. An example of this is the Agreement imposing discipline on Trooper Andre Paradis. The Agreement refers to a violation of “the code of conduct policy” and “the code of ethics” when he failed to take “appropriate enforcement action and fully cooperate with a law enforcement investigation.” The Agreement says nothing about the actions that violated the code of conduct policy or the code of

ethics, which provision of the conduct policy or code of ethics was violated, what “appropriate enforcement action” was not taken, or how the trooper failed to “fully cooperate” with an investigation.

40. Another disciplinary record where the conduct that gave rise to discipline is too vague to provide meaningful information is the Agreement imposing discipline on Sergeant Christopher Rogers. The Agreement imposing discipline on Sgt. Rogers refers to “conduct unbecoming a Maine State Police Sergeant while on duty[,]” a “code of conduct violation and misuse of state time and resources.” The Agreement says nothing about the specific actions that violated the code of conduct policy, what provision of the conduct policy was violated, or how state time and resources were misused.

41. In several instances, the State Police disclosed only unsigned Settlement Agreements with respect to discipline on certain officers, which raises questions about whether an Agreement imposing discipline was ever signed, whether other final disciplinary records exist, and whether any final signed Agreement differs from the unsigned document that was disclosed.

IV. No Just and Proper Cause for Redactions and Omissions

42. In the February 11, 2021 response to the *Press Herald* FOAA request, the State Police included a copy of a January 23, 2021 letter to provide “an explanation regarding the redactions made to the materials.”

43. The referenced letter is a response to a January 20, 2021 letter from the lawyer for the BDN, Bernard Kubetz. *See Exhibit D.* Kubetz pressed for an explanation about redactions the State Police had made in response to a FOAA request by the BDN for the same records requested by the *Press Herald*.

44. In the January 23, 2021 letter (**Exhibit E**), the State Police declined to say why any specific redaction had been made in the more than 80 pages of records, but offered four reasons for the redactions as a whole:

1. Information made confidential pursuant to 5 M.R.S. § 7070(2)(A) (regarding medical information) was redacted;
2. Information made confidential pursuant to 5 M.R.S. § 7070(2)(E) – namely, proposed, but not ultimately imposed, disciplinary action – was redacted;
3. Information implicating *Garrity* protections was redacted pursuant to 5 M.R.S. § 7070(2)(E);
4. Information in agreements describing in more detail alleged misconduct already publicly disclosed in related “final written decisions” that also were disclosed, was redacted pursuant to 5 M.R.S. § 7070(2)(E);

45. Each of the cited exceptions is unfounded in law or its application to the documents at issue here is unsupported.

46. The State Police refused to identify which records, if any, disclose medical information and, in any event, final written decisions related to disciplinary action taken against a public employee are not confidential.

47. There is no exception to FOAA for “proposed, but not ultimately imposed, disciplinary action” so long as disciplinary action of some kind has been taken.

48. The reference to “Garrity protections” refers to the Fifth Amendment privilege against use of coerced incriminating statements by police officers in subsequent criminal prosecutions recognized under *Garrity v. New Jersey*, 385 U.S. 493 (1967). But the records at issue here are final disciplinary decisions and Settlement Agreements, not transcripts of testimony by officers or their statements to investigators, so “Garrity protections” do not apply and cannot be just and proper cause to redact or withhold information responsive to the *Press Herald’s* FOAA request.

49. There is no exception for agreements “describing in more detail alleged

misconduct already publicly disclosed in related ‘final written decisions’ that also were disclosed.” Additional detail in a record would be a reason to disclose the record, not to withhold it.

51. The redactions to the records disclosed by the State Police are not “for just and proper cause” in violation of 1 M.R.S. § 409(1).

52. The State Police have not disclosed all documents responsive to the *Press Herald’s* FOAA request and have established no just and proper basis for their omission.

53. Because there is no exception justifying any or all redactions by the State Police and the State Police have not disclosed all documents responsive to the *Press Herald’s* FOAA request, the State Police has acted with bad faith sufficient to support an award attorney’s fees pursuant to 1 M.R.S. § 409(4).

COUNT I
REDACTIONS TO PUBLIC RECORDS WITHOUT JUST AND PROPER CAUSE

53. Plaintiff realleges and incorporates by reference the foregoing paragraphs of this Appeal as if fully set forth herein.

54. The State Police made redactions to the records provided in response to the *Press Herald’s* FOAA request without just and proper cause in violation of FOAA.

COUNT II
FAILURE TO DISCLOSE RESPONSIVE PUBLIC RECORDS WITHOUT JUST AND PROPER CAUSE

55. Plaintiff realleges and incorporates by reference the foregoing paragraphs of this Appeal as if fully set forth herein.

56. The State Police did not disclose all public records responsive to the *Press Herald’s* FOAA request without just and proper cause in violation of FOAA.

57. The State Police conducted an inadequate search for responsive records.

COUNT III
FAILURE TO PROVIDE EXCEPTIONS LOG LISTING BASIS FOR REDACTIONS TO
PUBLIC RECORDS

58. Plaintiff realleges and incorporates by reference the foregoing paragraphs of this Appeal as if fully set forth herein.

59. On February 2, 2021, the *Press Herald* requested that the State Police provide “a privilege log or so-called Vaughn index, for any redacted or withheld records [identifying] the specific exception that is relied upon as the basis for not disclosing or redacting any specific record.” See **Exhibit A**.

60. On February 11, 2021, the State Police did not directly respond to this request, but provided a copy of a January 23, 2021 letter to the BDN’s lawyer in which the State Police took the position: “We cannot identify, on a redaction-by-redaction basis, the statutory authority pursuant to which each redaction was made, as doing so would, in effect, disclose the very types of information these provisions are intended to protect.” See **Exhibit E**.

61. To the contrary, identifying the specific statutory basis for each redaction would not defeat the purpose of the redaction. For example, identifying a redaction as “medical information” would not disclose any medical details, and the same is true to the extent a redaction was made for proposed disciplinary action, information implicating Garrity protections, or information “describing in more detail alleged misconduct” disclosed elsewhere. See **Exhibit E**.

CONCLUSION

WHEREFORE, the *Press Herald* respectfully requests that the Court grant this appeal and enter judgment for Plaintiff and enter:

A. an order for disclosure pursuant to 1 M.R.S. § 409(1);

- B. an order that the State Police conduct an adequate search for all final disciplinary records responsive to the FOAA request;
- C. an order for disclosure of an exceptions log to the redactions;
- D. an award to the *Press Herald* its costs and reasonable attorney's fees pursuant to 1 M.R.S. § 409(4); and
- E. such other and further relief as the Court deems just and proper.

Dated at Portland, Maine this 23d day of February, 2021.

Respectfully Submitted,
MTM Acquisition, Inc.

By Its Attorneys,
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