STATE OF MAINE
PENOBSCOT, ss.

SUPERIOR COURT
Civil Action
Docket Nos. CIV-2021-13,
CIV-2021-42

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

BRIEF OF PLAINTIFFS IN SUPPORT OF FOAA APPEAL

MTM Acquisition, Inc., d/b/a *Portland Press Herald/Maine Sunday Telegram* (the "*Portland Press Herald*" or "*PPH*") and Bangor Publishing Company, d/b/a *Bangor Daily News* (the "*Bangor Daily News*" or "*BDN*") file this brief in support of their consolidated Appeals from Denial of Access to Public Records pursuant to 1 M.R.S. § 409(1) and M. R. Civ. P. 80(B).

INTRODUCTION

For many months, reporters for the *Portland Press Herald* and the *Bangor Daily News* have attempted to obtain records of officer misconduct from the Maine State Police. From early 2020, and continuing through the summer as protests against police violence gripped the nation,

they submitted a series of Maine Freedom of Access Act ("FOAA") requests to the Maine State Police for records of final discipline imposed on current and former State Police employees. These records are critical for the newspapers and the public to understand how—or whether—the Maine State Police ensures that its officers, who are charged with keeping Maine citizens safe and upholding the rule of law, are upholding the professional standards they espouse.

The State has produced only a partial response. Key portions of the records it provided to the newspapers remain redacted, the records refer to other documents that are responsive to the FOAA requests but were never produced, and the State's search could not have captured all responsive material. The result is that important information about police misconduct remains hidden, contravening Maine statutes ensuring public access. Compounding the problems, the State has refused to identify the statutory basis for individual redactions, offering only general justifications. The Court should reject the redactions for lack of proper justification, or at least examine the documents *in camera*,[1] and order the State to conduct a new, comprehensive search for records that have not yet been produced and are responsive to the Plaintiffs' requests.

STATEMENT OF FACTS

On May 29, 2020, Callie Ferguson, a reporter at the *Bangor Daily News*, submitted a FOAA request to the Maine Department of Public Safety for "[a]ll final written disciplinary decisions or dispositional findings regarding personnel investigations into current and former Maine State Police employees since Jan. 1, 2015" and "[a]ll settlement agreements reached between the Maine State Police and its employees since Jan. 1, 2015." Joint Statements of Fact ("JSF") ¶ 5; *see* Exhibit A.[2]

[1] Based on discussion with the State's counsel, Plaintiffs understand that the State will submit unredacted copies of the records to the Court for *in camera* review when it files its response.
[2] Exhibits cited in this brief refer to the exhibits filed alongside the Joint Stipulations of Fact.

Matt Byrne, a reporter at the *Portland Press Herald*, submitted two FOAA requests to the State Police seeking similar records. JSF ¶¶ 12-16. On February 2, 2021, he submitted what he described as a "unifying request" that sought all the records that were responsive to his previous two requests as well as those responsive to *BDN*'s request. JSF ¶ 17; *see* Exhibit E. The records responsive to that unifying request are all the records at issue in this appeal. The request sought all "records of final discipline for sworn employees or former employees of the Maine State Police," including any "settlement documents" between current or former Maine State Police employees and the State, from January 1, 2015 to July 2020. JSF ¶ 17; *see* Exhibit E. Mr. Byrne also requested that the State provide a "privilege log," or exception log, identifying the "specific exception relied upon" for any redaction or withholding. JSF ¶ 17; *see* Exhibit E. Mr. Byrne worked with the State Police to shorten the end date of his request, from July 2020 to May 29, 2020, to lighten the State's response workload. JSF ¶ 19.

In response to Mr. Byrne's request, the State produced a redacted set of records of final discipline on February 11, 2021. JSF ¶ 20-22; *see* Exhibit D. The State refused to produce an exception log identifying the statutory exception it claims for each redaction; instead, it offered only a list of general justifications and stated that each justification supported one or more of numerous redactions over more than 80 pages of records. *See* Exhibit D at 84.

The State produced a second batch of documents on March 3. These were signed versions of nine records that had been included unsigned in the February production. JSF ¶ 23; *see* Exhibit H. The February and March productions encompass all the records at issue in this case (apart from those the State has not produced). JSF ¶ 24. The records include several categories: records of employee discipline, discipline letters, settlement agreements, corrective memoranda, and written reprimands. *See* Exhibits D & H.

The State's March production, supplementing its February production with additional records that could have been—but were not—included in February, followed a pattern established in prior responses. In response to the *BDN*'s 2020 request, for instance, the State produced 53 pages on December 29, 2020 and stated that those were "the records responsive to the request." JSF ¶ 6; Exhibit B. But days later, it issued a second response, removing some of its redactions from two records in the prior production. JSF ¶ 7. On January 15, 2021, after the *PPH* requested copies of the records provided to the *BDN*, the State provided a set of 55 pages. JSF ¶¶ 14-15. But a week later, it produced an additional record that it claimed was responsive to the *BDN*'s original request but that it had neither provided to the *BDN* nor included in its original production to the *PPH*. JSF ¶ 16.

In several instances, the produced records refer to other final disciplinary records the State did not produce. JSF ¶ 28-42. For example, the settlement agreements pertaining to Troopers David Coflesky and Andre Paradis each refers to a separate "final disciplinary letter," yet no such letter was produced from either case. JSF ¶ 32-35. Similarly, the settlement agreements pertaining to Sergeants Christopher Rogers and Christopher Harriman each provides "stipulations in addition to the final discipline imposed in" the associated Professional Standards cases—yet the State produced no other documents from either of those cases. JSF ¶ 36-39. The State claims these missing documents do not exist. JSF ¶ 44-45. But in other instances, where settlement agreements contained the same provision stating that the stipulations were "in addition to the final discipline imposed in" the associated Professional Standards cases, the State produced discipline letters closing the Professional Standards cases. JSF ¶ 43.

According to the State, its search for responsive records entailed multiple steps, first involving an electronic database and then turning to paper files. First, the State entered the names

of State Police employees in IAPro, an electronic database that contains a list of "all case files created during a personnel investigation." JSF ¶ 26. The search aimed to identify which employees had records of "active" discipline in their personnel files, meaning discipline records that had not been removed from the file "pursuant [to] the terms of a collective bargaining agreement." JSF ¶ 26. Once the State identified the employees who appeared to have records of "active discipline" in their personnel files, the State manually searched those employees' paper files for the "active discipline" records, including settlement agreements. JSF ¶ 26.

It does not appear the State's search was capable of identifying any records of "inactive" discipline. It is also unclear whether the State stopped searching personnel files once it located the case files listed in IAPro, or continued to search those files for any other responsive records.

STANDARD OF REVIEW

FOAA provides that any person has "the right to inspect and copy any public record" unless "otherwise provided by statute." 1 M.R.S. § 408-A. The agency bears the burden of justifying its decision to withhold information, and its decision is subject to *de novo* review. 1 M.R.S. § 409(1); *MaineToday Media, Inc. v. State*, 2013 ME 100, ¶ 7, 82 A.3d 104.

The legislature has instructed courts to "liberally construe[] and appl[y]" the statute in order to further FOAA's "underlying purpose[]" that government action be "taken openly." 1 M.R.S. § 401. Courts must "strictly construe" any exceptions to the rule of public access. *Blue Sky W., LLC v. Maine Revenue Servs.*, 2019 ME 137, ¶ 23, 215 A.3d 812. Courts' review may be accomplished by *in camera* review of the documents at issue. *Dubois v. Dept. of Envtl. Prot.*, 2017 ME 224, ¶ 4, 174 A.3d 314.

ARGUMENT

I. THE STATE'S SWEEPING AND CONCLUSORY JUSTIFICATIONS FOR ITS REDACTIONS ARE IMPROPER

The State's redactions across the produced records are not supported by the narrow exceptions to public disclosure permitted under Maine law. Because the redactions are improper, the withheld information must be released.

Under FOAA, all written materials in the possession of a state agency are public records, and the state may only withhold those that are explicitly "designated confidential by statute." 1 M.R.S. § 402(3). As the Law Court has held repeatedly, these exceptions are "strictly construe[d]." *Blue Sky W.*, 2019 ME 137, ¶ 23, 215 A.3d 812. This disfavor for redaction and withholding is particularly strong where, as here, the documents at issue constitute "the final written decision[s]" imposing discipline against state employees. 5 M.R.S. § 7070(2)(E). Such decisions must be made public in their entirety, with exceedingly narrow exceptions. *Anctil v. Dep't of Corr.*, 2017 ME 233, ¶ 10, 175 A.3d 660.

None of the State's exemptions support its redactions. Maine's personnel records statute, 5 M.R.S. § 7070, exempts certain limited categories of information in personnel records. The State cites three such categories: (1) Section 7070(2)(E), which exempts "complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action"; (2) Section 7070(2)(A), which exempts employees' medical information; and (3) Section 7070(2)(D-1)(4), which exempts information pertaining to an employee's "[m]ental or physical disabilities." Def.'s Stmt. of Position ("SOP") in *Bangor Publishing Co. v. Maine* at 2. But the State reads the exceptions far too broadly, and sometimes incoherently. The Court should order the State to release the records, or at least review them *in camera* to determine what portions should be released.

a. The State wrongly withheld information under Section 7070(2)(E)

The State wrongly redacted four categories of information under 5 M.R.S. § 7070(2)(E). Section 7070(2)(E) requires disclosure of a "final written decision" in a disciplinary action, but absent one, it permits withholding "complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action." The State relies on these exceptions for withholding four categories: (1) information contained in settlement agreements between the employee or their union and the Maine State Police that were entered into "in addition to the final written decision relating to disciplinary action"; (2) "proposed but not ultimately imposed disciplinary action"; (3) "information related to alleged conduct that does not result in discipline"; and (4) "information potentially implicating *Garrity* protections." SOP in *MTM Acquisition Inc. v. Maine* at 2.

These redactions are baseless for two reasons. First, as a threshold matter, Section 7070(2)(E) provides that "the final written decision relating to [a disciplinary] action" becomes public "if it imposes or upholds discipline"—and thus the exceptions otherwise permitted by (2)(E) do not apply. Here, *all* responsive records are final written decisions imposing or upholding discipline. This includes the settlement agreements, which are the "final written decision[s]" in their cases—a fact the State admits for at least some of the settlement agreements it produced. *See* JSF ¶ 44. Section 7070(2)(E) requires that the documents become public; there is nothing to redact under that Section. *See Anctil*, 2017 ME 233, ¶ 10, 175 A.3d 660. Second, even ignoring this threshold problem, none of the State's categories fall within the narrow exceptions permitted by Section 7070(2)(E).

i. Section 7070(2)(E) does not permit the State's redactions to the responsive records, including the settlement agreements, because the records are final written decisions that impose or uphold discipline

All the State's redactions under 7070(2)(E) are unlawful. That section requires that, "[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." 5 M.R.S. § 7070(2)(E). In other words, the State may not use Section 7070(2)(E) to redact information from "final written decision[s]" if those decisions impose or uphold discipline. *Id.* These decisions are "no longer confidential." *Id.*

This provision disposes of all the State's redactions under Section 7070(2)(E) in documents responsive to plaintiffs' requests for "[a]ll final written disciplinary decisions." *See* JSF ¶ 17. By definition, these documents are "not confidential." 5 M.R.S. § 7070(2)(E).

This provision also disposes of the State's redactions to documents responsive to plaintiffs' requests for "settlement documents." *See* JSF ¶ 17. Although the statute does not refer to settlement agreements, the State has stipulated that at least some of the responsive settlement agreements are the "final written decision" in the relevant disciplinary matter. *See* JSF ¶ 44 ("[I]n the cases of David Coflesky, Andre Paradis, Christopher Rogers, and Christopher Harriman . . . the 'final written decision' imposing discipline was the Settlement Agreement."). Yet the State redacted information from exactly those agreements it conceded are final written decisions. *See* Exhibit H at 4 (Harriman settlement agreement); *id*, at 19-20 (Coflesky settlement agreement).

Even when other disciplinary documents do exist, the settlement agreement still constitutes part of the final written decision. The agreements produced by the state incorporate the other documents by reference, making both the agreement and the related documents part of the entire "final written decision" "that is not appealed," as defined by Section 7070(2)(E)(1), when the employee does not pursue any further grievance procedures. *See, e.g.*, Exhibit H at 8

(Pelletier settlement agreement stating that the settlement's stipulations, including a 20-day suspension and an admission of guilt, are "in addition to the final discipline imposed" in the professional standards case); Exhibit H at 7 (Pelletier discipline letter in the same case). The same openness thus applies to settlement agreements as to other final written decisions.

The State's redactions cannot stand under Section 7070(2)(E), since final written decisions "are not confidential." However, even if they could pass that threshold bar, the State could not show that any of the information it redacted falls within a statutory exception.

ii. The State wrongly withheld information related to "proposed, but not ultimately imposed, disciplinary action"

There is no statutory basis for the State's redaction of the details of "proposed, but not ultimately imposed, disciplinary action" from final written decisions. SOP in *MTM Acquisition Inc. v. Maine* at 2. The State cites Section 7070(2)(E)'s provision permitting it to withhold "complaints, charges or 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). But that provision offers no support for the State's redactions.

The exemption in (2)(E) is "narrowly drawn." *Guy Gannett Pub. Co. v. Univ. of Maine*, 555 A.2d 470, 472 (Me. 1989). Proposed disciplinary actions clearly are not "[c]omplaints, charges or accusations of misconduct." 5 M.R.S. § 7070(2)(E). Nor are they "any other information or materials that may result in disciplinary action," *id.*, as proposed disciplinary action is not information or material that could "result in" the very thing the proposed action constitutes. The exception therefore cannot cover the material the State claims here.

iii. The State wrongly withheld information related to alleged conduct that did not result in discipline

The same analysis applies to the State's redaction of "information related to alleged conduct that [did] not result in discipline." SOP at 2. Faced with a similar argument in *Anctil,* the

Law Court rejected the Department's claim that (2)(E) allowed it to redact from a final written decision imposing discipline "a description of a past incident of misconduct by other employees." 2017 ME 233, ¶ 10, 175 A.3d 660. The statute, the Court held, permitted the State to redact nothing but the names of the other employees because the remaining material was "a portion of the final written decision," which was "specifically deemed 'no longer confidential'" by (2)(E). *Id.* The same logic applies here. If information about alleged conduct that did not lead to discipline is included in the final written decision, then it is no longer confidential.

iv. *Garrity* provides no basis for withholding information under FOAA

The State claims that Section 7070(2)(E) provides support for redacting "information potentially implicating *Garrity* protections." SOP at 2. It does no such thing. The text of (2)(E) does not mention *Garrity*. Moreover, *Garrity* material does not fit within the exception and, in any case, the documents at issue are not *Garrity* material. In *Garrity v. New Jersey*, 385 U.S. 493 (1967), the Supreme Court held that the government could not use employee statements in a criminal prosecution when it had told him he would be fired for refusing to answer questions. *Garrity* material is thus material obtained from employees by coercion and used in a subsequent criminal prosecution—a situation unrelated to the records here, where there is no indication the records contain answers obtained by coercion, and where the records are not being used in a criminal prosecution.

b. The State has not established that the exemptions for medical and personal information apply

The State also appears to have improperly redacted material under two exemptions in Section 7070—exemption (2)(A) and (2)(D-1)(4)—that deal with medical information and information about mental or physical disabilities. The redactions go beyond the statute's limited

provisions, which must be "strictly construe[d]" to avoid undermining FOAA's policy of open government. *Blue Sky W.*, 2019 ME 137, ¶ 23, 215 A.3d 812.

Exemption (2)(A) exempts "[m]edical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders." As the second clause of (2)(A) makes clear, the provision covers diagnoses of, and treatments for, particular conditions, including mental and emotional ones. In the words of the Law Court, that means information that "describes expressly or by clear implication" an individual's "medical condition or medical treatment." *Guy Gannett*, 555 A.2d at 471. That definition requires the employee to actually have the medical condition described. If the record describes a medical condition the employee is merely speculated to have, refers to the employee's health in general terms, or contains any other statement that, while superficially medically related, does not reveal "expressly or by clear implication" a particular condition or treatment, it cannot fall within the exemption. *See id.*

Exemption (2)(D-1)(4) allows for the redaction of personal information pertaining to "[m]ental or physical disabilities." The State claims that this permits the redaction of "references to psychological evaluations or substance abuse counseling." SOP at 2. But the State's interpretation is excessively broad. After all, the mere fact of a psychological evaluation would not reveal any particular mental disability. Neither would a reference to substance abuse counseling, such as a recommendation, absent a diagnosis of substance abuse, that an employee pursue such counseling. Even a claim by a co-worker that an individual has a mental or physical disability would not necessarily reveal that the individual does, in fact, have that condition.

For both provisions, the State's refusal to link a specific exemption to a specific redaction makes the redactions hard to evaluate. But its interpretations of the exemptions are clearly too

broad. The Court should order the State to produce unredacted versions of these records. In the alternative, the Court should evaluate the State's claimed redactions through *in camera* review.

II. THE STATE'S FAILURE TO EXPLAIN INDIVIDUAL REDACTIONS VIOLATES FOAA

When an agency denies a FOAA request, it must provide the requester "written notice . . . stating the reason for the denial." 1 M.R.S. § 408–A(4). The State violated that requirement by failing to justify individual redactions, instead offering only general justifications that might apply to any of them. The State claimed that justifying specific redactions "would, in effect, disclose the very types of information those provisions are intended to protect." Exhibit D at 84. That argument is legally baseless for two reasons. First, it contravenes the statutory text, which allows the State to withhold only the records themselves, not the reasons for the withholding. Second, it defies FOAA's purpose of advancing government transparency because it prevents Plaintiffs, the public, and even the Court from scrutinizing the State's arguments. The Court should order the State to produce a redaction-by-redaction explanation of its claimed exceptions.

First, the State's approach is inconsistent with the statutory text. The statute allows it to withhold documents, but not to withhold its reasons for withholding documents. For example, the law exempts "personal references submitted in confidence," 5 M.R.S. § 7070(2)(B), but the *fact* that a document contains such a reference is not a "personal reference." In other words, if a personal reference were withheld, the "personal reference" exemption would not shield disclosure of the reason for its withholding. Thus, even if the State's redactions were proper, the exemptions would not permit the State to withhold the reasons for the redactions.

Far from protecting the fact that documents contain exempt material, as the State claims, FOAA requires the state to disclose that information: the state must provide "written notice … stating the reason for denial." 1 M.R.S. § 408–A(4). This provision dooms the State's argument.

Consider a hypothetical FOAA production that contained only one redaction—say, for medical information. Here, it would be impossible for the State to avoid stating that it was redacted under Exemption 2(A). And FOAA contains no provision allowing the State to be less specific in its justification simply because it cites more than one exemption. Under the State's argument, a person could simply request any one of the redacted documents here and the State would be obligated to disclose the reason for the redaction—encouraging multiple sequential requests, rather than one unified request. FOAA cannot allow that absurd result.

In addition to being textually baseless, refusing to provide a "reason for the denial" of specific information contravenes FOAA's goal of opening the government to public scrutiny by undermining the public's ability to challenge the State's withholdings. Courts have consistently recognized just that in cases involving the federal Freedom of Information Act (FOIA), to which Maine courts look to "inform [their] analysis of Maine's FOAA." *Blethen Maine Newspapers, Inc. v. State*, 2005 ME 56, ¶ 13, 871 A.2d 523. Litigation in information access cases, courts have explained, is characterized by an "asymmetrical distribution of knowledge": the requester must challenge legal justifications without access to all the underlying facts. *King v. DOJ*, 830 F.2d 210, 218 (D.C. Cir. 1987). Requiring a detailed, redaction-by-redaction exceptions log is one of the only ways for courts to "correct, however imperfectly," that informational inequality. *Id.* For example, requesters and courts can use a redacted passage's context to contest claimed exemptions only if they know why the passage was redacted. Under FOIA, courts thus require agencies to "specifically identify[] the reasons why a particular exemption is relevant" and link those claims to "the particular part of a withheld document to which they apply." *Id.* at 219.

Redaction-by-redaction justifications benefit the reviewing court as well as the public. Linking up exemptions and redactions is the only way to enable "meaningful review" of an

agency's decision. *Id.* If the government instead provides only "sweeping and conclusory" citations to exemptions, the reviewing court may struggle to determine which exemptions apply to which redactions and thus whether particular material is properly withheld. *Oglesby v. U.S. Dept. of Army*, 79 F.3d 1172, 1184 (D.C. Cir. 1996).

The State's inconsistent redactions in this case illustrate the need for transparency. In its February production, the State provided two versions of the records of employee discipline for Christopher Gay that had conflicting redactions. *Compare* Exhibit D at 4 & 6 *with id.* at 65 & 66. A paragraph referencing the "Living Resources Program," which was available to address any "personal difficulties" of employees, was redacted in the first version of each record, Exhibit D at 4 & 6, and unredacted in the second version, Exhibit D at 65 & 66. Conversely, Mr. Gay's Employee Number was unredacted in the first version and redacted in the second version. That the State redacted information it also conceded was public casts doubt on the accuracy of the State's other redactions. As to the Employee Number, there may be an exception somewhere in Maine law that supports redacting such information. But none of the State's claimed exceptions do. These redactions demonstrate why requiring a detailed exceptions log helps ensure the accuracy of redactions, since the log forces the government to "analyze carefully" the material it is withholding. *Jud. Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006).

Recognizing this need for specific justifications, Maine courts regularly order agencies to provide specific and complete explanations for withheld documents and redactions, and agencies often provide such redaction-by-redaction exceptions logs on their own. In *Anctil*, for example, in response to a request for complaints and charges that resulted in disciplinary action, the State provided a list of redactions by document number, a description of the information underneath the redaction, and the specific exemption that applied. *See* Brief of Defendant-Appellee at 7-8,

Anctil v. Dep't of Corrections, 2017 WL 9251045 (detailing the State's exceptions log). When the agency does not provide such a log, courts can order it to do so. *See, e.g., Dubois v. Me. Office of the A.G.*, 2017 Me. Super. LEXIS 68, at *2 (Apr. 12, 2017).

Even when an agency claims that an exemption log would reveal the information the exceptions are protecting and a detailed explanation must be provided *in camera*, courts require agencies to provide "as much as possible" of the information in their public declarations. *Armstrong v. Executive Office of the President*, 97 F.3d 575, 580-81 (D.C. Cir. 1996); *see also Lion Raisins v. Dept. of Agric.*, 354 F.3d 1072, 1084 (9th Cir. 2004) (overruled on other grounds) (overturning district court decision that relied on *in camera* review of sealed declaration and remanding for creation of exceptions log). The reason is the same as for providing exceptions logs in the first place: making explanations public, rather than keeping them *in camera*, allows the adversarial system to function effectively by enabling "criticism and illumination" from the party seeking disclosure. *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976).

The State must identify its specific statutory basis for each redaction. This Court should order it to provide a redaction-by-redaction explanation of the exceptions it claims.

III. THE STATE CONDUCTED AN INADEQUATE SEARCH

The Court should also order the State to conduct a complete search for documents responsive to the Plaintiffs' requests, since the State's responses demonstrate that its search was incomplete.

To justify an order to conduct a search for missing documents, Maine law requires two showings: (1) a denial, *Moore v. Rowe*, 2004 Me. Super. LEXIS 253, at *9 (Dec. 23, 2004); and (2) "probative evidence" that those denied documents exist, *Doyle v. Town of Scarborough*, 2015 Me. Super. LEXIS 221, at *5 (Dec. 4, 2015).

The State's failure to produce all records responsive to the request, *see* section III(a), *infra*, is a denial of those records. That is clear because each unjustified omission constitutes a "failure to respond," and any such failure constitutes a denial. *Campbell v. Town of Machias*, 661 A.2d 1133, 1135 (Me. 1995). Since FOAA provides the public a right to "inspect and copy *any* public record," 1 M.R.S. § 408-A (emphasis added), the production of some responsive records does not exhaust the public's right to access all public records. Therefore, the state denies a FOAA request whenever it does not produce a non-exempt responsive document.

Three types of "probative evidence" justify a further search. First, settlement agreements produced by the State refer to final disciplinary decisions that were responsive to the requests but were not produced. Second, the State's description of its search indicates that it did not look for all documents that would have been responsive. Third, the State's inconsistent responses to the Plaintiffs' requests underscore that its searches were unreliable. The Court should order the State to conduct a complete search for responsive documents, both for the missing records identified in the produced documents and for documents not encompassed by its initial search.

a. The produced documents refer to missing responsive documents

Multiple documents produced by the State refer to records that were not produced but were responsive to the Plaintiffs' requests. Specifically:

- The Settlement Agreements pertaining to Troopers Paradis and Coflesky state that "[t]he final discipline will be as outlined in the final disciplinary letter." Exhibit D at 12; Exhibit H at 19. The State did not produce these "final disciplinary letter[s]."
- The Settlement Agreement pertaining to Sergeant Rogers states that the "final discipline decision on [the Professional Standards case] . . . will be sustained" and provides "stipulations in addition to the final discipline imposed" in the Professional Standards

case. Exhibit H at 1. The State did not produce any documentation on this "final discipline decision" or the imposed "final discipline."

- The Settlement Agreements for Sergeant Harriman and Corporal Fiske provide stipulations "in addition to the final discipline imposed" in the respective Professional Standards cases. Exhibit H at 4; Exhibit D at 50. Again, in both cases the State did not produce any documentation on the imposed "final discipline."

The missing documents are clearly responsive to Plaintiffs' requests for "records of final discipline." JSF ¶ 17. The State does not disagree. Instead, it claims that the documents do not exist because they were not listed in its electronic investigations database, IAPro, which the State believes would list these documents if they existed. JSF ¶¶ 44-45.

There are three reasons to question the State's claim. *First*, the settlement agreements specifically reference these missing documents, such as a "final disciplinary letter" or an "addition[al] final discipline imposed." They also refer to the documents in the past tense, indicating that they had been written. Indeed, the settlement agreements cross-reference the letters as providing *additional information* concerning the discipline imposed. On their face, the settlement agreements thus strongly suggest these missing documents exist.

Second, other documents in the record prove that settlement agreements exist in tandem with records like the unproduced documents. The Murray, Pelletier, and Fowlie settlement agreements all refer to "stipulations in addition to the final discipline imposed in" the related Professional Standards cases, and the State's productions included final disciplinary letters pertaining to those cases. JSF ¶ 43. This shows that the language identifying other disciplinary documents often does refer to documents that actually exist.

Third, just because the missing documents were not listed in the State's database does not mean they do not exist. Their absence is equally consistent with an inadvertent failure to log them. When the State searched employees' paper files for documents listed in IAPro, there is no indication that it continued searching those folders after locating the agreements it was looking for. *See* JSF ¶ 26. Missing responsive documents that were inadvertently left out of IAPro could be sitting in personnel folders waiting to be found. The State also could have asked disciplined employees or their supervisors whether these documents existed, which could have revealed logging errors.

The Court should therefore order the State to conduct a complete search for the responsive records, which should include searching the employees' entire personnel files, and asking disciplined employees or their supervisors whether the records at issue existed.

b. The State's search was not capable of locating all responsive records

Rather than search for "all records of *final* discipline" as requested, JSF ¶ 17 (emphasis added), the State only searched for records of "*active* discipline," JSF ¶ 26 (emphasis added). The State defines "active discipline" as "discipline records that had not been removed from an employee's file pursuant [to] the terms of a collective bargaining agreement." JSF ¶ 26. This limitation excluded an entire class of final disciplinary records responsive to the request: those not contained in an employee's personnel file. The State had no basis to unilaterally limit Plaintiffs' requests to only "active discipline" records.

There are compelling reasons to believe that a search outside employees' personnel files would have borne fruit. The collective bargaining agreements covering employee disciplinary records allow employees to request that certain documents be "removed from [their] personnel files" as soon as one year after the discipline was imposed. JSF ¶ 49, 53, 54, 57, 58. Thus, any

such records generated between January 1, 2015 and May 29, 2019 (a year before the date of the *BDN*'s request) could have been removed from personnel files before the State's search. The State could not rule out the existence of these documents and, therefore, inappropriately limited the search to records that could be found in personnel files.

While it is not clear where the State keeps disciplinary records removed from personnel files, they must be somewhere. A State agency can only destroy records if the records are "on approved record retention schedules." 29-225 Me. Code R. ch. 1, § 13(A)(1). Employee personnel records are retained for 60 years unless a "collective bargaining contract requires that disciplinary documents be destroyed earlier." Me. State. Gen. Sch. 10(1) (2015), https://www.maine.gov/sos/arc/records/state/gsjune2015.pdf. The collective bargaining agreements relevant here do not authorize the destruction of any disciplinary documents—they only allow certain records to be "removed" from personnel files. *See* JSF ¶¶ 48-59. Once removed, the record must be stored elsewhere for the remainder of the 60 years.

Moreover, one of the collective bargaining agreements shows that documents removed from a personnel file can sometimes be put back in—so "removed" must not equate to "destroyed." Under the Maine State Troopers Association Agreement, employees may request removal of their discipline records 60 days before they plan to retire. JSF ¶ 54. But if they later decide not to retire, the removed discipline records must be returned to their personnel files. JSF ¶ 54. When documents are removed from a file, therefore, they are not destroyed.

The State Police have claimed that "[u]nder a union contract, some public records of discipline are destroyed." Callie Ferguson, Matt Byrne, Erin Rhoda, *Inside the Maine State Police, officer misdeeds are kept secret,* Bangor Daily News (April 18, 2021), https://bangordailynews.com/2021/04/18/mainefocus/inside-the-maine-state-police-officer-

misdeeds-are-kept-secret/. But the union contracts do not allow destruction. The removed documents thus exist somewhere the State did not search. The Court should order it to look there.

c. The State's pattern of incomplete searches strongly suggests that its most recent searches were inadequate

The State has a pattern of finding more responsive documents after making productions, further suggesting it has not found everything yet. Two incidents demonstrate the pattern.

First, in response to identical requests from *BDN* and *PPH*, the State provided two sets of records to *BDN*, JSF ¶ 6-7, and later to *PPH*, JSF ¶ 15, but then came back and provided another responsive document to only *PPH*, JSF ¶ 16. This document was dated July 29, 2020 and should have been provided to both parties as part of the State's prior productions. But it was only given to *PPH*, and only belatedly. Second, after initially producing 85 pages on February 11, 2021, the State produced an additional response the following month, consisting of nine signed copies of records that had previously been produced only in unsigned version. JSF ¶ 20, 23.

This, plus the missing responsive documents named in produced records, the State's search inappropriately limited to "active discipline," *and* the inconsistent redactions discussed above, constitutes "probative evidence" that additional records exist. For these reasons, the Court should order the State to conduct a proper and complete search.

CONCLUSION

Plaintiffs respectfully request this Court: (A) enter "an order for disclosure" of all requested records in their unredacted form pursuant to 1 M.R.S. § 409(1), or at least review the records *in camera* review to determine which redactions, if any, are properly applied; (B) order the State to produce a log identifying the exemption it claims for each redaction; and (C) order the State to conduct a new, complete search for responsive records.

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Respectfully Submitted,

MTM Acquisition, Inc d/b/a Portland Press Herald/Maine Sunday Telegram

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