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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 DEFENDANT STATE OF MAINE IN OPPOSITION TO PLAINTIFFS' FOAA APPEAL

Defendant State of Maine files this brief in opposition to Plaintiffs' consolidated Appeals from Denial of Access to Public Records pursuant to 1 M.R.S. § 409(1) and M.R. Civ. P. 80(B).

FACTS

Plaintiff Bangor Publishing Company ("BPC") served a request for personnel records of certain employees on the Maine State Police ("MSP") pursuant to the Maine Freedom of Access Act on or about May 29, 2020. (Joint Stipulations of Fact ("JSF") ¶ 5). Specifically, BPC requested "all final disciplinary decisions or dispositional findings regarding personnel investigations into current or former Maine State Police employees since Jan. 1, 2015," and "all

settlement agreements reached between the Maine State Police and its employees since Jan. 1, 2015." (JSF ¶ 5).

Plaintiff MTM Acquisition, Inc. ("MTM") served three requests between February 2020 and February 2021 for personnel records of certain employees of the MSP pursuant to the Maine Freedom of Access Act. (JSF ¶¶ 12, 14, 17). Those requests encompassed all of the documents requested by the BDN.

In responding to all of the requests, the State cumulatively engaged in the process of searching records maintained by the Department of Administrative and Financial Services, Security and Employment Human Resources Service Center ("HR"), which maintains the personnel files for employees of MSP. (JSF ¶¶ 25, 26). Staff from MSP's Office of Professional Standards ("OPS") utilized a list of MSP employees for the time period at issue to search its electronic investigations database ("IAPro"). All case files created during a personnel investigation of sworn employees are listed in IAPro. OPS staff searched IAPro by employee name to determine which sworn employees should have active discipline—meaning discipline records that had not been removed from an employee's file pursuant to the terms of a collective bargaining agreement—in their paper personnel files. OPS then gave HR the names of those employees, and HR manually searched the paper employee personnel files for final disciplinary decisions, including settlement agreements. (JSF ¶ 26)

With respect to civilian employees, HR utilized the list of MSP employees to manually search the paper employee personnel files of civilian employees. MSP's staff attorney also checked with HR and the State's Office of Employee Relations regarding pending grievances to determine whether disciplines for certain employees were final. (JSF ¶ 26).

In response to the BDN's request, on December 29, 2020, MSP produced records but redacted certain portions of those records. (JSF ¶ 6). By letter dated January 23, 2021, MSP's staff attorney generally explained why redactions were made, with citations to applicable statutory authority contained in 5 M.R.S. § 7070. (JSF ¶ 8).

In response to MTM's request, MSP produced records but redacted certain portions of those records, (JSF ¶ 22), pursuant to certain provisions contained in 5 M.R.S. § 7070.

Plaintiffs subsequently filed this appeal.

ARGUMENT

I. The State Properly Redacted Information Deemed Confidential by Statute from the Public Records Produced

First, MSP conducted a diligent search for responsive records and produced all such records. MSP did not withhold any public records that were responsive to the requests. To the extent that "final disciplinary decisions" were referenced in other records produced but were not included with the responsive documents, those decisions never actually existed, as discussed below.

Second, MSP properly, and in good faith, redacted those portions of the personnel records that are deemed confidential pursuant to various sections of 5 M.R.S. § 7070. Although 5 M.R.S. § 7070 provides that final written decisions relating to disciplinary action are no longer confidential after the decision is completed if it imposes or upholds discipline, the statute also makes records containing the following information confidential and not open to public inspection:

- Medical information of any kind (5 M.R.S. § 7070(2)(A));

- Personal information pertaining to the employee's mental or physical disabilities (which could include references to medical treatment, medical evaluations, mental health and other counseling) (5 M.R.S. § 7070(2)(D-1)(4));
- 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)). This category may include information related to alleged conduct that does not result in discipline; proposed but not ultimately imposed disciplinary action; information potentially implicating *Garrity* protections, including statements made in response to allegations during a personnel investigation in which there is also a potential for criminal liability; and information contained in settlement agreements entered into by the employee/employee union and MSP in addition to the final written decision relating to allegations of misconduct.

To the extent the public records produced by MSP contained any of the above categories of information, the information was redacted.

A. <u>Maine Law Permits Redactions to Final Disciplinary Decisions</u>

Plaintiffs make the sweeping argument that section 7070(2)(E) does not permit any redactions to the records produced because the records are final written decisions that impose or uphold discipline. That argument is incorrect and should be rejected. "When a public record contains information that is not subject to disclosure under FOAA, the information may be redacted to prevent disclosure." *Anctil v. Department of Corrections*, 2017 ME 233, ¶ 6, 175 A.3d 660; *see also Doyle v. Town of Falmouth*, 2014 ME 151, ¶ 9, 106 A.3d 1145. Final disciplinary decisions are no different from other public records in that regard.

The Law Court addressed the issue of whether certain information could properly be redacted from a final disciplinary decision in the *Anctil* case. In *Anctil*, at least one of the public documents at issue on appeal was a final written disciplinary decision that had been redacted. *Anctil,* 2017 ME 233 at ¶ 9. As to that document, the Court held that "the redaction in [the document] was appropriate because, although the redacted language was contained in a final written decision, the decision did not 'impose[ ] or uphold[ ] discipline' as to the portion of the decision that was redacted." *Id.* Therefore, it is well settled that redactions to final disciplinary decisions are permitted, whether those decisions are in the form of final discipline forms or settlement agreements.

B. Redactions Were Proper Under 5 M.R.S. § 7070(2)(E)

MSP properly redacted certain information deemed confidential by 5 M.R.S. § 7070(2)(E) from the final disciplinary decisions and settlement agreements that were produced.

Title 5 M.R.S. § 7070(2)(E) makes certain personnel information of State employees confidential. That section provides:

> The following records shall be confidential and not open to public inspection, and shall not be 'public records,' as defined in Title 1, section 402, subsection 3:
>
> (2) Personal information. Records containing the following, except they may be examined by the employee to whom they relate when the examination is required or permitted by law:
>
> E. Except as provided in section 7070-A, 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. 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. If an arbitrator completely overturns or removes disciplinary action from an employee personnel file, the final written decision is public except that the employee's name must be deleted from the final written decision and kept

> confidential. If the employee whose name was deleted from the final written decision discloses that the employee is the person who is the subject of the final written decision, the entire final written report, with regard to that employee, is public.
>
> For purposes of this paragraph, "final written decision" means:
>
> (1) The final written administrative decision that is not appealed pursuant to a grievance arbitration procedure; or
>
> (2) If the final written administrative decision is appealed to arbitration, the final written decision of a neutral arbitrator.

In this case, MSP produced “Record of Employee Discipline” forms, final disciplinary decisions in the form of a letter or memo, and settlement agreements between the employee/employee union and MSP. (JSF, Exhibit D). In some cases, the settlement agreement constitutes the “final written decision.” In some cases, a settlement agreement was entered into in addition to the final disciplinary decision form, letter, or memo. In some cases, a final disciplinary decision form, letter, or memo was issued without an additional settlement agreement. The following is a summary of the responsive records that were produced:

Date	Employee	Final Discipline Form, Letter or Memo	Settlement Agreement
4/7/16	David Coflesky		X
9/8/16	Andre Paradis		X
9/30/16	Brian Creamer		X
1/5/17	Christopher Rogers		X
7/6/17	Scott Harakles		X
7/10/17	Daniel Ryan		X
7/25/17	Christopher Harriman		X
2/18/18	Brian Creamer		X
5/2/19	Christopher Gay		X
9/23/19	Daniel Murray	X	X
11/13/19	Kyle Pelletier	X	X

11/13/19	Elisha Fowlie	X	X
7/30/20	Tom Fiske	X	X
1/11/18	Christopher Gay	X	
2/28/18	Christopher Gay	X	
2/6/18	David Muniec	X	
2/27/19	Tyler Maloon	X	
9/17/19	Dezarae Fillmyer	X	
10/9/19	William Baker	X	
1/30/20	Richard Spicer	X	
11/12/19	Christopher Tupper	X	

With respect to those cases in which settlement agreements were entered into in addition to issuance of a final discipline form, letter, or memo, Defendant disagrees with Plaintiffs' assertion that "even when other disciplinary records do exist, the settlement agreement still constitutes part of the final written decision." (Pl. Br. 8). The settlement agreements are separate documents and should be treated as such. Regardless, to the extent that settlement agreements contain information deemed confidential, the information is properly redacted from those documents as well.

1. The State Properly Redacted Information Related to Alleged Misconduct that Did not Result in Discipline and Proposed but not Ultimately Imposed Discipline

Plaintiffs rely on the wrong portion of the Court's holding in *Anctil* to support their argument that the State improperly redacted information related to alleged misconduct that did not result in discipline and proposed but not ultimately imposed discipline. In fact, *Anctil* supports the redactions. As stated above, in *Anctil*, document #0012 was a final disciplinary decision that contained redactions. Specifically, the redacted material contained a description of allegations of misconduct that were not substantiated, and therefore did not result in final discipline. Brief for Defendant-Appellee, *Anctil v. Department of Corrections*, 2017 WL 9251045, *7 (No. KEN-17-123). The Court upheld the redaction "because, although the

redacted language was contained in a final written decision, the decision did not 'impose[] or uphold[] discipline' as to the portion of the decision that was redacted." *Anctil*, 2017 ME 233 at ¶ 9. Therefore, any information contained in a final discipline or settlement agreement relating to an allegation of misconduct that was not sustained or discipline that was not upheld is properly redacted.

2. The State Properly Redacted Information Relating to Complaints, Charges or Accusations of Misconduct, and Replies to Those Complaints, Charges or Accusations

As discussed above, 5 M.R.S. § 7070(2)(E) provides that replies to complaints, charges or accusations of misconduct are confidential. Specifically, the State properly redacted information related to the employee's reply to complaints, charges or accusations of misconduct that were elicited or given during the personnel investigation in cases where there was/is the potential for criminal charges stemming from the conduct. *Garrity v. New Jersey*, 385 U.S. 493 (1967), stands for the proposition that if a public employee is ordered to participate in a personnel investigation under threat of discipline or discharge, any information offered cannot be used against the employee in any subsequent criminal proceeding. To that end, any information or admissions given during a personnel investigation and included in a final disciplinary decision or settlement agreement in cases involving conduct that could involve potential criminal charges should not be made public to prevent the possibility that such information or admissions could be used against the employee or taint the proceeding.

Further, in cases in which there is a settlement agreement in addition to a "final disciplinary decision," additional details about the allegation of misconduct obtained from the investigation case file that is not included in the final disciplinary decision was properly redacted.

C. Redactions Were Proper Under 5 M.R.S. § 7070(2)(A) & 7070(2)(D-1)(4)

Title 5 M.R.S. § 7070(2)(A) provides an exception to disclosure for public employee personnel records containing "[m]edical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders." *Guy Gannett Publ'g Co. v. University of Maine*, 555 A.2d 470, 471 (1989). In addition, 5 M.R.S. § 7070(2)(D-1)(4) provides that "personal information, including that which pertains to the employee's . . . mental or physical disabilities" shall be confidential and not open to public inspection, and shall not be "public records."

Although the general rule is that exceptions to the Freedom of Access Act should be strictly construed, the Law Court has acknowledged that the statutory exception protecting medical information "of any kind" is broadly drawn. *Guy Gannett Publ'g Co.*, 555 A.2d at 471 ("indeed, it would be difficult to draft the exception any more broadly").

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

Id.

The exception not only encompasses an employee's medical condition, but also medical treatment, including counseling, therapy, and evaluations. Plaintiffs' interpretation that the exception is limited to treatment of a particular medical condition is too narrow. Given that the exception is so broadly drawn it is reasonable to conclude that it also encompasses general treatment or evaluation of a perceived or potential medical condition or disability or to detect or diagnose a medical condition or disability, as well as to treat a particular diagnosed condition.[1]

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[1] In addition, both the Americans with Disabilities Act and the Maine Human Rights Act contemplate discrimination claims based on perceived disability. Disseminating treatment or evaluation information

Therefore, redactions of information pertaining to medical information "of any kind" was proper. *See Guy Gannett Publ'g. Co.,* 555 A.2d at 471-72 (redaction of sentence containing medical information from settlement agreement was proper).

II. The State Provided the Reasons for the Redactions

Plaintiffs allege that the State refused to provide a reason for the denial of specific information contained in the public records that were produced and that the refusal is a violation of the Maine Freedom of Access Act. The Maine Freedom of Access Act requires that the agency provide a "written notice of the denial, stating the reason for the denial. 1 M.R.S. § 408-A(4). MSP provided statutory citations for its redactions to the records produced. MSP did not identify, on a redaction-by-redaction basis, the statutory authority pursuant to which each redaction was made for each individual employee record, as doing so would have, in effect, disclosed the very information those statutory provisions are intended to protect—specifically the existence of medical information "of any kind."

In the federal context, courts have recognized that there are occasions when extensive public justification would threaten to reveal the very information for which an exemption to a public record request is claimed. *See Lykins v. United States Dep't of Justice*, 725 F.2d 1455, 1464 (D.C. Cir. 1984). For example:

> When an agency has disclosed a great deal of a document and withholds only a few lines that would reveal the identity of a confidential source, and when the trial court's *in camera* review confirms that such a confidential source would be revealed, the kind of justification proffered in the public [document] does not violate *Vaughn*'s strictures against overly sweeping and conclusory invocation of FOIA exemptions.

Id.

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poses the risk of unfavorable treatment to the employee by the public based on a perceived medical condition, as well as an actual condition.

Citing 5 M.R.S. § 7070(2)(A) or 5 M.R.S. § 7070(2)(D-1)(4) to justify a specific redaction to an identified employee's record would disclose that the record contains medical-related information or information that may suggest that the identified individual has or is perceived to have a medical condition or disability. If MSP had identified, on a redaction-by-redaction basis, the statutory authority for other redactions, but not the redactions made to those specifically identified employee's records pursuant to 5 M.R.S. § 7070(2)(A) or 5 M.R.S. § 7070(2)(D-1)(4), it would have been easy to deduce that those redactions omitted from the redaction-by-redaction justification contained some form of medical information related to the identified employee. To protect the employee's privacy with respect to this information, MSP in good faith generally identified the specific statutory provisions relied upon for the redactions without tying each redaction to a specific employee document.

In this case, redactions were made to only 9 pages[2] of records and the justification limited to just three statutory exceptions. It is unclear how identifying the statutory authority on a redaction-by-redaction basis would have given Plaintiffs any additional information with which to determine whether the State's redactions were appropriate or to make their arguments in this appeal.

MSP has submitted the 9 pages of records that contain redactions, along with the affidavit of Staff Attorney Christopher Parr listing the justifications for each of the redactions, to the Court for *in camera* review, so that the Court may determine whether the redactions were appropriate.

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[2]Fourteen pages contained redactions; however, three of those pages included only a redaction of the employee number, and two other pages contained redactions that were subsequently removed. Therefore, those five pages have not been submitted for *in camera* review.

III. The State Conducted a Thorough Search for Responsive Documents

As supported by the parties' joint stipulations, MSP conducted a thorough search of its records to identify documents responsive to the requests. Plaintiffs' allegation that the State's responses demonstrate that its search was incomplete is baseless.

First, MSP began its search with a list of all MSP employees for the time period at issue. Using the list, MSP's Office of Professional Standards manually searched each name in its electronic investigations database ("IAPro") for active disciplines for each employee. All case files created during a personnel investigation of sworn employees are listed in IAPro. OPS then gave Human Resources the names of those employees, and Human Resources manually searched the paper employee personnel files for final disciplinary decisions and settlement agreements. For civilian employees, Human Resources personnel used the list of MSP employees to manually search the paper files of civilian employees for final disciplines and settlement agreements.

The State disputes that the produced documents refer to "missing" responsive documents.

- The settlement agreement for Christopher Rogers states that: "The final discipline decision on IA 2016-132 will be sustained and outlined below. Both parties agree to the following stipulations in addition to the final discipline imposed in IA 2016-132. The settlement agreement does not state that there is a separate final discipline decision or document containing stipulations. Both are contained in the agreement;
- The settlement agreement for Christopher Harriman states that: "The case is sustained and the final discipline will be as outlined below. Both parties agree to the following stipulations in addition to the final discipline imposed in IA 2017-041. The settlement agreement does not state that there is a separate final

discipline decision or document containing stipulations. Both are contained in the agreement;

- The State produced both a final discipline (written reprimand) and a separate settlement agreement for Tom Fiske (see Exhibit D to JSF, at 67);
- With respect to Andre Paradis and David Coflesky, the State represents that although the settlement agreements reference a "final disciplinary letter," one was not issued in either case. (JSF ¶ 44). If one had been issued, that fact would be reflected in IAPro, and the State would have produced the documents in response to the FOAA request;
- With respect to Christopher Gay and David Muniec, although the final disciplinary decisions mention past "performance expectations" or "performance improvement plans," in the narrative, those documents are not attached to, incorporated into, or made part of the final discipline decision, so are not responsive to the requests. Therefore, the documents are not "missing." In any event, even if they were attached or incorporated into the final disciplinary decision, performance evaluations are deemed confidential by 5 M.R.S. 7070(2)(B) and are not public documents.

With respect to Plaintiffs' allegation that documents are "missing," from the response, the State has provided an explanation, as outlined above, and consistent with that explanation, cannot produce documents that never existed in the first place.

IV. Records Removed from Employee Personnel Files Pursuant to Collective Bargaining Agreements

The State acknowledges that its record retention schedules allow destruction of employee disciplinary records earlier than set forth in the schedule if a collective bargaining agreement requires it, and that the collective bargaining agreements in the record provide for removal of those records from the employee's personnel file rather than destruction. The purpose of the removal provision in the collective bargaining agreements is to give employees who have not had further disciplinary issues after a certain time period the opportunity to repair their disciplinary record. A requirement to produce disciplinary records that have been previously removed from an employee's personnel file pursuant to a collective bargaining agreement as a public record responsive to a FOAA request would run counter to the spirit and intent of the removal provision. However, recognizing the difference between the terms used in the collective bargaining agreements and the record retention schedules, the State acknowledges that the Court could find that the current interpretation and practice is not consistent with the public records law. If so, the State is prepared to change its practice to produce that category of records in response to a FOAA request.

CONCLUSION

Defendant respectfully requests that the Court deny the Plaintiffs' appeal.

Dated: May 27, 2021

Respectfully submitted,

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