STATE OF MAINE
PENOBSCOT, ss.

SUPERIOR COURT
Civil Action
Docket No. 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

REPLY OF PLAINTIFFS IN SUPPORT OF FOAA APPEAL

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

The State's brief fails to support its redactions to the records produced to Plaintiffs, and it does not explain why responsive records appear to be missing or why it should not be ordered to go back and conduct a complete search. The State should be ordered to provide Plaintiffs with unredacted copies of the records, identify which exemptions apply to which redactions, and conduct a complete search for records responsive to the Plaintiffs' FOAA requests.

I. SECTION 7070(2)(E) DOES NOT PERMIT THE STATE'S REDACTIONS

The State has not shown just and proper cause for its claimed redactions under Section 7070(2)(E). The statute is "narrowly drawn," *Guy Gannett Pub. Co. v. U. of Maine*, 555 A.2d 470, 472 (Me. 1989), and any exceptions to its broad disclosure requirements must be "strictly construed," *Doyle v. Town of Falmouth*, 2014 ME 151, ¶ 10, 106 A.3d 1145, 1148. "The burden of proof is on the agency or political subdivision from which the information is sought to establish just and proper cause for the denial of a FOAA request." *MaineToday Media, Inc. v. State of Maine*, 2013 ME 100, ¶ 9, 82 A.3d 104, 109 (cleaned up). None of the redaction categories the State claims under this statute—for "proposed but not ultimately imposed disciplinary action," conduct that does not result in discipline, information contained in settlement agreements, or *Garrity* material—are permitted under the required strict construction of Section 7070(2)(E).

a. The State cannot justify its redactions under the exceedingly narrow exceptions in Section 7070(2)(E)

As an initial matter, the State's brief did not defend its redactions of "proposed but not ultimately imposed disciplinary action." Although it included that phrase in a subheading, nowhere in the brief did it actually discuss or defend those redactions. *See* State's Br. in Opposition ("Def. Br.") at 7-8. As Plaintiffs' opening brief explained, such redactions cannot be justified by any language in Section 7070(2)(E).

For several other categories of redactions, the State relies on *Anctil* but bypasses the decision's central holding: because final written decisions are "no longer confidential," 5 M.R.S. § 7070(2)(E), they must be released with only exceedingly narrow exceptions.[1] *Anctil v. Dep't.*

[1] The State has conceded that in some instances, settlement agreements are properly treated as final written decisions. *See* JSF ¶ 44. But it incorrectly claims that settlement agreements are distinct from final written decisions in cases where both exist. Def. Br. at 7. In fact, the

of Corr., 2017 ME 233, 175 A.3d 660. In that decision, the Law Court permitted redacting only two things: unsubstantiated allegations against the employee who was subject to discipline, and the names of employees who were allegedly involved in misconduct but were not subject to the discipline contained in the final written decision. *Id.* ¶¶ 9, 10. Other than those "narrow" redactions, the Court ordered the redacted portions of several documents to be released, emphasizing that "we 'strictly construe[ ]' any exceptions to disclosure." *Id.* ¶ 11. Specifically, it ordered the State to release:

- "a description of a past incident of misconduct by other employees," *id.* ¶ 10;
- "allegations of misconduct of another employee involved in the incident that resulted in the discipline," *id.*; and
- the name of the officer who was the victim of the disciplined employee's misconduct, *id.* ¶ 11; *Anctil v. Dep't of Corr.*, Br. of Defendant-Appellee., 2017 WL 9251045, *8.

Where "the plain language of section 7070(2)(E) does not create an exception," the Law Court declined to expand any exception beyond the plain language chosen by the Legislature. *Anctil*, 2017 ME at ¶ 11. Thus, even the name of an officer who was the victim of misconduct, and unsubstantiated allegations against employees other than the one who was disciplined, had to be released because the Legislature had not included such information in the exceedingly limited categories that may be redacted. *Id.* ¶¶ 10-11. This comports with the Law Court's observation that Section 7070(2)(E) is "narrowly drawn," *Guy Gannett Pub.*, 555 A.2d at 472, and any

settlement agreements make clear that they are an integral part of the final disciplinary actions, and they incorporate the other documents by reference, creating integrated final written decisions. In the case of Kyle Pelletier, for example, the settlement agreement stated, "The case will be closed and the final discipline will be outlined below," adding that various stipulations were to be imposed "in addition to the final discipline imposed." JSF Exhibit H at 8. By its terms, the settlement agreement provides a key part of the officer's final discipline.

exceptions to its sweeping disclosure requirements must be "strictly construed," *Doyle*, 2014 ME at ¶ 10. The State's redactions must be evaluated under this exacting standard, and the redacted information must be released to the Plaintiffs.

b. *Garrity* does not support the redactions

The State both overstates the holding of *Garrity* and fails to explain why *Garrity* would apply to the statements at issue here. The State begins with a correct statement of the law: "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." Def. Br. at 8 (emphasis added). But then the State expands the decision beyond its breaking point, claiming that "*any* information or admissions" given by an officer in an investigation that could result in criminal charges must be exempt from disclosure under FOAA. Def. Br. at 8 (emphasis added). That is not what *Garrity* stands for. The privilege applies only to information obtained by coercion, such as a threat that the individual would be disciplined for remaining silent. *See Moffett v. City of Portland*, 400 A.2d 340, 344 (Me. 1979) (holding that the threat of discipline for remaining silent meant that officers were deprived of their "free choice to admit, to deny or to refuse to answer," in violation of the Fifth Amendment's privilege against self-incrimination). Whether the underlying investigation could have resulted in criminal charges does not answer the question that is key to *Garrity*: whether, in the course of that investigation, the State threatened an individual with discipline for refusing to make a statement, and the individual made a statement because of that threat.

The State has not carried its burden to show that it extracted any statements from any of the disciplined officers by coercion. In fact, the State has provided no evidentiary basis at all to

conclude that the statements it redacted actually were the result of testimony extracted through involuntary compulsion "under threat of discipline or discharge" rather than given voluntarily.

The State also has not established that the *Garrity* privilege even applies to final disciplinary records sought under FOAA. In *Moffett*, the Law Court cited *Garrity* in holding that interview transcripts, which came from an investigation that concluded that complaints of officer misconduct were "without merit," could be withheld under FOAA. *Moffett,* 400 A.2d at 343. Those transcripts were obviously not a "final written decision" that "imposes or upholds discipline," and therefore they would not have fallen under Section 7070(2)(E)'s mandate that such decisions are "no longer confidential." 5 M.R.S. § 7070(2)(E). *Moffett* says nothing about withholding final written decisions. As discussed above and in Plaintiffs' opening brief, Section 7070(2)(E) requires disclosure of final written decisions with exceedingly narrow exceptions. The Legislature specifically chose to make these specific types of records public in their entirety. Even if the State did provide sufficient evidence to show the statements here fall under *Garrity*, Section 7070(2)(E) does not allow the statements to be redacted from the documents here.

II. THE STATE INTERPRETS THE MEDICAL EXEMPTIONS TOO BROADLY

The State contends that 5 M.R.S. § 7070(2)(A) allows it to redact all information concerning an employee's "medical treatment, including counseling, therapy, and evaluations." Def. Br. at 9. This interpretation is too broad. The statute exempts "[m]edical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders." 5 M.R.S. § 7070(2)(A). As Plaintiffs showed in their opening brief, this includes only information relating to the diagnosis and treatment of medical conditions that employees actually have. Pls. Br. at 10-12. But even if it swept more broadly, the State's authorities say nothing to suggest that *all* references to potential counseling and therapy are exempt "[m]edical information." For instance, a disciplinary decision requiring that a trooper get help for a drinking

problem does not pertain to the trooper's medical diagnosis, because there is no diagnosis and the disciplinary officer is not competent to make one. It also does not describe an employee's medical treatment, because, at that point, the trooper had not received any treatment. *Guy Gannett Pub. Co. v. University of Maine* does not help the State's argument, for the exempt information there "describe[d] expressly or by clear implication aspects of an employee's medical condition or medical treatment." 555 A.2d 470, 471 (1989).

The State also suggests in a footnote that information concerning a perceived disability should be exempt because federal and Maine law prohibit discrimination on the basis of perceived disability. Def. Br. at 9 n.1. But the State cites no authority that these laws apply to FOAA. And to the extent the State seeks to evoke concerns that its releasing information about its employees' perceived disabilities could cause it to discriminate against its employees, these concerns are misplaced. After all, the State is itself aware of all information in any of the records at issue, so keeping the public in the dark hardly stops the State from discriminating. In addition, the laws the State cites prohibit such discrimination, and the employees would have recourse under those laws should any discrimination occur.

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

Plaintiffs argued in their opening brief that the State's refusal to identify particular redactions with particular exemptions violates FOAA's requirement that it provide "written notice . . . stating the reason for the denial." 1 M.R.S. § 408-A(4). Plaintiffs showed that failing to provide such information deprives requesters and the reviewing court of information essential to evaluating the redactions' propriety. Pls. Br. at 12-15.

The State has all but conceded this argument by filing an affidavit *in camera*, with a highly redacted version for Plaintiffs, "listing the justifications for each of the redactions."[2] Def. Br. at 11. Yet it continues to maintain, while failing to address any of the numerous contrary authorities cited in Plaintiffs' opening brief, that identifying particular redactions with particular exemptions would itself disclose exempt information. It also has no response to Plaintiffs' arguments that the fact that there is medical information under a redaction marking is not *itself* medical information, and that its suggestion to the contrary is belied by FOAA's text and structure.

The one case the State cites, *Lykins v. United States Dep't of Justice*, 725 F.2d 1455 (D.C. Cir. 1984), does not support its position. In *Lykins*, the Court of Appeals affirmed a trial court's decision, following *in camera* review of redacted material, that ordering the government to provide a more complete description of a redaction would reveal the identity of a confidential source—information exempt under the federal Freedom of Information Act's Exemption 7(D). *See id*. at 1463-1464; *see also* 5 U.S.C. § 552(b)(7)(D). This holding is irrelevant to the instant case. Here, Plaintiffs are not requesting a description of the redacted information, but simply an explanation of which exemption applies to it—information the agency in *Lykins* had already provided the plaintiff by asserting that the redacted information was exempt *under Exemption 7(D)*.

IV. THE STATE FAILS TO JUSTIFY THE COMPLETENESS OF ITS SEARCH

The State has no meaningful response to Plaintiffs' challenge to its search. As Plaintiffs argued, the search was ineffective both because the documents the State produced refer to other

[2] Plaintiffs have filed a motion to unseal this affidavit. Should the Court grant this motion, Plaintiffs reserve the right to submit supplemental briefing concerning its substance.

responsive documents that it did not produce, and because the State's description of its search does not rule out the substantial likelihood these and other responsive documents exist.

As a partial response, the State denies that some of the produced settlement agreements—those pertaining to Christopher Rogers and Christopher Harriman—refer to other responsive documents. Def. Br. at 12-13. This is not plausible. The settlement agreements do, in fact, refer to other documents, as they state that the stipulations they contain are "in addition to the final discipline imposed in [the related Professional Standards case]." *See* Pls. Br. at 16-17 (citing settlement agreements). Even were there any ambiguity on this point, identical language is contained in settlement agreements from other cases for which the State also produced a separate final disciplinary decision. *See id*. This confirms that the documents mean what they say: there are other documents.

The State claims the other missing documents do not exist because they were not listed in the State's electronic investigations database ("IAPro"). *See* Def. Br. at 13. But, as Plaintiffs explained in their opening brief, the absence of these documents from IAPro may be the result of the State's inadvertent failure to log them. Pls. Br. at 18. The State could have resolved the inconsistency between IAPro and the plain language of the produced documents by looking through each page of the relevant employees' personnel files. It could have asked the employees themselves. It could have asked their supervisors or the investigators who were involved in their discipline. But the State apparently has not done so.

V. THE STATE SHOULD PRODUCE INACTIVE DISCIPLINARY RECORDS IF THEY EXIST, AND SHOULD NOT DESTROY SUCH RECORDS IN THE FUTURE

In their opening brief, Plaintiffs argued that the State's search was incomplete because it excluded records that may have been removed from employees' personnel files. Plaintiffs showed that if the State was following the law, these removed records would still have to be kept

somewhere, since regulations prohibit the State from destroying public records except as specified in collective bargaining agreements, and the agreements applicable here do not authorize destruction. Pls. Br. at 18-19. In response, the State "acknowledges" that "the collective bargaining agreements in the record provide for removal of those records from the employee's personnel file rather than destruction." Def. Br. at 14. However, it does not outright say whether responsive documents were destroyed rather than removed.[3]

If the State possesses responsive records that it removed from employees' personnel files, it must produce them. The State halfheartedly asserts that "[a] requirement to produce disciplinary records that have been previously removed from an employee's personnel file pursuant to a collective bargaining agreement . . . would run counter to the spirit and intent of the removal provision." Def. Br. at 14. FOAA contains no exemption for disciplinary records removed from a personnel file. To the contrary, 5 M.R.S. § 7070(2)(E) provides that "the final written decision relating to [disciplinary] action is no longer confidential after the decision is completed if it imposes or upholds discipline." This provision does not exempt inactive or "removed" disciplinary decisions, and it is role of the Legislature, not a State agency, to decide what records are public.

Because the State has apparently destroyed at least some responsive records for which the collective bargaining agreements permit only removal from a personnel file, the Court should order the State to immediately cease this illegal practice. The Maine State Archives' General

[3] On June 2, 2021, counsel for the parties conferred to clarify this point. The State's counsel indicated that the MSP's typical practice is to destroy records once removed from personnel files, but that she could not guarantee that all documents removed from personnel files were actually destroyed; some may still exist somewhere. She also indicated that the MSP had not searched for any documents that might have been removed from personnel files but not destroyed.

Schedule requires the State to retain personnel records for 60 years unless a "collective bargaining contract requires that disciplinary documents be destroyed earlier." Me. State. Gen. Sch. 10(1) (2015)[4]; *see also* Pls. Br. at 19. Here, as the State admits, the collective bargaining agreements provide for removal and *not* for destruction. While the State speculates about "spirit and intent," the plain language of the regulation requires disclosure, and a "spirit and intent" for disclosure is just as plausible: it is one thing to sanitize an employee's personnel file, but quite another to prohibit an agency from keeping any record whatsoever of employee discipline. The Court should conclude, as the State all but admits, that its "current interpretation and practice is not consistent with the public records law." Def. Br. at 14. The Court should order the State to look for the removed documents, and if they were in fact destroyed, the Court should order the State to stop this illegal practice.

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); (B) order the State to produce a log identifying the exemption it claims for each redaction; (C) order the State to conduct a new, complete search for responsive records; and (D) order the State to immediately cease destroying disciplinary records removed from personnel files. Plaintiffs also request oral argument, as contemplated in the Scheduling Order.

Dated June 7, 2021

Respectfully Submitted,

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

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[4] https://www.maine.gov/sos/arc/records/state/gsjune2015.pdf.

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