Reference # 79-mta

STATUTE: 23 MRSA §63

AGENCY: Maine Turnpike Authority (also sent to Maine Department of Transportation)

CONTACT PERSON: Jon Arey

RETURN BY: September 30, 2022

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 22 through 24-A; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

This statute protects two related categories of documents – (a) records relating to negotiations for and appraisals of property, and (b) records and data relating to engineering estimates of costs on projects to be put out to bid.

The exception dealing with appraisals has not been invoked by the MTA for several years. It was invoked in an eminent domain proceeding in 2005, and the issue was resolved at the State Claims Commission phase with the parties exchanging appraisals. There have been instances since then when an owner of a property the MTA seeks to acquire has sought to obtain appraisals of other nearby property owners and the MTA has invoked this exception.

Regarding engineering estimates, this exception has not been invoked for many years, but the MTA believes it is extremely important to its competitive bid process, as described below.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

The MTA supports continuation of this exception in regard to appraisals. It protects the bargaining position of the MTA in negotiations with landowners and, in the case of persons seeking appraisals of others property, it protects the privacy rights of private landowners.

The MTA supports continuation of this exception in regard to engineering estimates and believes it is essential to the integrity of the competitive bidding process that these estimates not be public information. If these estimates were public information before award, it would create a situation where some bidders had a competitive advantage or create a system conducive to bidder collusion. This practice is consistent with federal guidance from the Federal Highway Administration, AASHTO, and the Departments of Transportation and Justice (see attached).

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

The language is clear.

4. Does your agency recommend changes to this exception?

No.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

§ 63. Confidentiality of records held by the department and the Maine Turnpike Authority

1. Confidential records. The following records in the possession of the department and the Maine Turnpike Authority are confidential and may not be disclosed, except as provided in this section:

A. Records and correspondence relating to negotiations for and appraisals of property; and

B. Records and data relating to engineering estimates of costs on projects to be put out to bid.

2. Engineering estimates. Engineering estimates of total project costs are public records after the execution of project contracts.

3. Records relating to negotiations and appraisals. The records and correspondence relating to negotiations for and appraisals of property are public records beginning 9 months after the completion date of the project according to the record of the department or Maine Turnpike Authority, except that records of claims that have been appealed to the Superior Court are public records following the award of the court.

From FHWA's Contract Administration Core Curriculum 2006 (Part III(A)(2))

Estimate Confidentiality.

Although FHWA discourages disclosure of the estimate, FHWA policy does not require that the engineer's estimate be kept confidential. If a STA does publicize the estimate, the information must be made available to all bidders.

As a result of the bid rigging scandal during the early 1980's, the AASHTO supports estimate confidentiality in its 1981 guidance, *"Suggested Guidelines for Strengthening Bidding and Contract Procedures."* The DOT and DOJ also address this issue in their joint 1983 guidance, *"Suggestions for the Detection and Prevention of Construction Contract Bid Rigging."*

Among the STAs, the policies and procedures regarding confidentiality of the estimate range from including the estimated cost in the bid proposal, to not disclosing the estimate, even after the award is made. Publicizing the estimate minimizes any advantage a bidder might gain by procuring the estimate secretly, and removes possible pressure on STA employees to secretly release the estimate. A significant disadvantage of releasing the estimate is that firms may be able to use the information to manipulate their bids.

Although keeping the estimate confidential will not by itself deter collusion among bidders, it will prevent bidders from knowing the approximate amount that the contracting agency is willing to pay for the project. In those States where confidentiality of the estimate is not possible, FHWA recommends that a value range for the estimate be developed and included in the bid proposal. In addition, for bid bond purposes, several STAs specify a range rather than specifying an actual dollar amount.

In July 2001, 33 FHWA Division Offices responded to a questionnaire regarding the disclosure of the engineer's estimate. Four States indicated that they disclose the engineer's estimate with the project advertisement (LA, MA, PR, TX). Six States publish an estimated cost range with the advertisement (AL, HI, NE, OR, PA, WA). Twelve States never disclose the engineer's estimate (AR, DC, FL, GA, IA, KY, ME, MO, NH, NJ, NY, WV). Eleven States disclose the estimate upon award of the contract (AK, CO, DE, ID, IN, MT, NM, NC, ND, UT, WA, WY).

From AASHTO Guidance - "Suggested Guidelines for Strengthening Bidding and Contract procedures (1981)

"In the interest of creating the best possible environment for open competition in the bidding process for public contracts, it is recommended that the detailed engineer's estimate be kept secret."

From 1983 Joint Recommendation of USDOT and USDOJ on "Suggestions for the Detection and Prevention of Construction Contract Bid Rigging

Note: This guidance suggests estimates should be confidential before the job is awarded in order to prevent collusion and explains why in a little more detail.

The State Engineer's Estimate Should Not Be Disclosed Prior to the Award of the Job.

Some state agencies include their engineer's cost estimate for a project among the materials furnished to prospective bidders. The agency may provide either an estimate for each line item on the bidding form or a lump sum estimate for the entire project.

We suggest that state agencies maintain all such estimates as confidential until after the bids are received and a contract is awarded. Releasing this information earlier encourages and facilitates bid rigging by permitting prospective bidders to gauge what the state agency would consider to be a reasonable price for the project and to decide how far a rigged bid may exceed the estimate without jeopardizing the award of a contract.*

We are not aware of any compelling business reason for making the state engineer's estimate available to prospective bidders. It is not necessary to help them estimate the cost of materials, sine bidders are intimately familiar with these costs. Relying on past experience, bidders can readily determine their own mobilization and labor costs. We are advised that state engineers in some cases obtain the data on which their estimates are based from the same contractors who later bid on the job. We are persuaded, therefore, that the bidding process would not be impaired if the state engineer's estimates were withheld from prospective bidders prior to the letting of construction contracts.

* In some states, if the lowest bid exceeds the state estimate by 10 percent, the bidding process is repeated and the project is re-let.

STATUTE: 23 MRSA §63

AGENCY: Department of Transportation (also sent to Maine Turnpike Authority)

CONTACT PERSON: James Billings

RETURN BY: September 30, 2022

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Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

Response: Please see narrative below.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

Response: MaineDOT supports continuation of this exception for the reasons discussed in the narrative below.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

Response: MaineDOT is not aware of any problems. The language is sufficiently clear.

4. Does your agency recommend changes to this exception?

Response: MaineDOT does not recommend any changes to this exception.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

Response: There are no identifiable stakeholders.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

Response: MaineDOT has no further information.

Maine Department of Transportation Narrative

The exceptions in this statute are used all the time in the regular course of MaineDOT's affairs. The statute is tailored to the critical work MaineDOT performs in getting highway, bridge, and multimodal projects out the door for construction. In order to ensure an open, fair, competitive bidding process internal MaineDOT engineering estimates cannot be released until after a contract has been awarded. Otherwise, some or all of the bidders could gain inside information about the expectations of MaineDOT about construction costs, and thereby game the system by hedging their bids. For example, if one or more bidders on a $50 million project knew the details of MaineDOT engineering estimates, the bidders could tailor their bids to receive the award. This could result in an unlevel playing field if some but not all bidders had this information. Also, if all bidders have this information, it could harm the public by further driving up costs because bidders would not have any incentive to bid lower than the engineer's estimate; instead, bidders could game the system by bidding a certain percentage above the estimate, figuring that MaineDOT would still award a contract with some tolerance for having the bids come in higher than estimates. So, in the $50 million project example, if bidders knew the estimates, they could just decide that they'd bid 15% or 25% over the estimate, figuring that if they were lowest bidder, the contract would be awarded anyway. This could create an atmosphere of bid collusion.

As far as the appraisals being confidential, this also is something we deal with every day. MaineDOT acquires property rights by eminent domain on hundreds of parcels every year. By law we have to appraise the rights we intend to acquire for a project well in advance of acquiring the rights. The appraisals are opinions of fair market value for the rights we need. We are required to pay just compensation for the rights we acquire by the state and federal constitutions. Thus, the appraisals are key to satisfying this constitutional requirement. In our project process, after preliminary design identifies what we need for property rights, and title work is done identifying apparent owners of the land, we next have to appraise the rights, then make an offer of compensation. There is then a statutory mandatory minimum period that we have to leave open for negotiation

with landowners before we can condemn. In most circumstances, we cannot advertise a project for bid until we have certified that we have acquired the rights we need for construction. Thus, every project getting out timely that requires acquiring new rights, requires an appraisal. The taxpayers pay for these appraisals whether they are done by internal appraisers or by outside appraisers under contract with MaineDOT.

These appraisers serve a dual role. Their work forms the basis of the constitutionally mandated payment of just compensation, but they also serve as MaineDOT's expert witnesses when cases cannot be resolved by agreement and a hearing becomes necessary to resolve differences of opinion between the landowner and MaineDOT over property values. The time between the appraisal being performed and a hearing is usually many months or even years. This is because appraisals happen way in advance of construction, and most hearings on unresolved claims occur only after construction is complete. During this time, negotiation can and does still occur between the landowners and MaineDOT. It would put MaineDOT, and thus the taxpayers, at a severe disadvantage in these negotiations, if the appraisals were not confidential by statute. At some point prior to a hearing landowners can apply to the state claims commission to have the appraisals turned over so that the landowners can see them before a hearing. If the unresolved case goes on to the superior court on appeal, landowners can obtain the appraisal reports as part of regular civil discovery rules, under Maine case law.

Further, if the appraisals were not confidential by statute, other third parties besides the owner of the specific parcel at issue could obtain them. Either other landowners on the same project, or just any third party who wanted it with no connection to the project, could request the appraisals and obtain detailed information including financial information and opinions of value about a landowner's property.

Reference # 80
MTA RESPONSE NOT RECEIVED AS OF 11/14/22

STATUTE: 23 MRSA §1980, sub-§2-B

AGENCY: Maine Turnpike Authority

CONTACT PERSON: Jon Arey

RETURN BY: September 30, 2022

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Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

4. Does your agency recommend changes to this exception?

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

Reference # 81
MTA RESPONSE NOT RECEIVED AS OF 11/14/22

STATUTE: 23 MRSA §1982

AGENCY: Maine Turnpike Authority

CONTACT PERSON: Jon Arey

RETURN BY: September 30, 2022

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1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

4. Does your agency recommend changes to this exception?

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

STATUTE: 23 MRSA §1982

AGENCY: Maine Turnpike Authority

CONTACT PERSON: Jon Arey

RETURN BY: September 30, 2022

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QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

This statute makes confidential any "log or record identifying the name, address or travel patterns of a patron of the turnpike." It has been invoked rarely. This information is often provided to law enforcement in response to subpoenas and has been provided on at least one occasion to Maine Revenue Services in response to a subpoena.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

This statute has a similar rationale to the confidentiality provisions of 23 MRSA 1980 (2-B) and we support it for the same reasons. It protects the privacy of customers of the Maine Turnpike.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

We have no issues with this provision.

4. Does your agency recommend changes to this exception?

No.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

23 MRSA §1982

A log or record identifying the name, address or travel patterns of a patron of the turnpike, whether prepared for enforcement of authority tolls or other purposes of the authority, is for the exclusive use of the authority in the discharge of its duties under this chapter. This material is confidential and is not available to the public except that a law enforcement officer or a representative of an insurance company making a request for specific records in the course of conducting the officer's or representative's business may have access to this material to the extent and in the manner access to such material is afforded under Title 1, chapter 13, subchapter I.[1] The authority may release accident and other incident reports to affected parties and may release information specific to a commuter pass account or commercial billing account to the holder of that account. The authority may disclose patron information, including information gathered by photo-monitoring devices, to other toll administrative agencies that are participating with the authority in multiple-facility, electronic, transportation-related collection systems.

STATUTE: 23 MRSA §1982

AGENCY: Maine Turnpike Authority

CONTACT PERSON: Jon Arey

RETURN BY: September 30, 2022

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2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

This statute has a similar rationale to the confidentiality provisions of 23 MRSA 1980 (2-B) and we support it for the same reasons. It protects the privacy of customers of the Maine Turnpike.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

We have no issues with this provision.

4. Does your agency recommend changes to this exception?

No.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

23 MRSA §1982

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STATUTE: 23 MRSA §4244, sub-§§3 and 4

AGENCY: Maine Department of Transportation

CONTACT PERSON: James Billings

RETURN BY: September 30, 2022

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Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

   Response: Maine Department of Transportation ("MaineDOT") receives Contractor Prequalification Applications and Bid Applications for requests for proposal as an ongoing normal part of business throughout the year and receives renewal Contractor Prequalification Applications annually as part of the contractor re-certification process. Annually approximately 75 contractors submit either a prequalification application or a renewal prequalification application. Bid Applications for requests for proposal are dependent on the number of bids put out annually. In 2021 235 bids were put out as requests for proposal. The exceptions in 23 M.R.S. § 4244, sub-§§ 3 and 4 apply to all of these applications. As a standard part of prequalification for contractors and requests for proposals MaineDOT requires potential contractors to submit their financial data, industry trade secrets detailing their method for meeting contract terms, civil rights and equal employment records and other information customarily regarded as confidential business information, which are subject to these exceptions. MaineDOT cites these exceptions on average six to eight times annually in partial denial of FOAA requests or in administrative or other litigation.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

   Response: MaineDOT supports continuation of the exceptions provided under 23 M.R.S § 4244, sub-§§ 3 and 4. A full and fair bidding process has the potential to both reduce costs and increase quality bids. Removing these confidentiality protections could adversely impact the ability of MaineDOT to attract qualified and reputable contractors. Prequalification of contractors based on their safety experience, compliance with equal employment opportunity requirements, financial status, and expertise ensures the safety of the workforce and the public and protects the State's interests. The competitive bidding process for requests for proposals allows MaineDOT to evaluate contractor bid submissions for goods and services with an emphasis on the potential return on the investments to the State. Removal of these protections could also damage the ability of qualified and reputable contractors to compete fairly and erode commercial standards of commercial ethics and may also disincentivize intellectual endeavors of said contractors. Furthermore, policy regarding the confidentiality of these records is reflected in the Maine Rules of Civil Procedure ("MRCP"). A person may seek an order from the court to prevent "a trade secret or other confidential research, development, or commercial information" from being disclosed during discovery in connection with a court proceeding under MRCP Rule 26(c). This Rule further emphasizes the importance of shielding sensitive financial data and trade secrets from disclosure.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

   Response: No problems have occurred in the application of this exception. It is clear that the records described are intended to be confidential under the Freedom of Access Act. The language of these exceptions is sufficiently clear in describing the records that are covered. No problems have occurred in the application of these exceptions.

4. Does your agency recommend changes to this exception?

   Response: MaineDOT does not recommend any changes to this exception.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

   Response: Associated General Contractors of Maine

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

   Response: MaineDOT has no further information.

STATUTE: 23 MRSA §4251, sub-§10-A

AGENCY: Maine Department of Transportation

CONTACT PERSON: James Billings

RETURN BY: September 30, 2022

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QUESTIONS

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Response: Please see narrative below.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

Response: MaineDOT supports continuation of this exception for the reasons discussed in the narrative below.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

Response: MaineDOT is not aware of any problems. The language is sufficiently clear.

4. Does your agency recommend changes to this exception?

Response: MaineDOT does not recommend any changes to this exception.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

Response: Any business entity could participate in a public-private partnership under this statute.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

Response: MaineDOT has no further information.

Maine Department of Transportation Narrative

23 MRSA §4251 was enacted in 2009 to authorize MaineDOT to receive or solicit proposals to form a public-private partnership for transportation facility projects with an estimated initial capital cost of $25 million or more. Proposals must meet the standards set out in Section 4251.

If MaineDOT receives an unsolicited proposal from a private entity that meets these standards, it must publish a notice stating that it has received the proposal and inviting additional proposals for a transportation facility meeting the same basic purpose and need for a 120-day period. After the close of the 120-day period, MaineDOT must rank the proposals received and undertake negotiations on the highest-ranked proposal. If negotiations are not successful, MaineDOT may negotiate on the remaining proposals in the order of their ranking. If only the initial proposal is received, MaineDOT must negotiate with the entity submitting that proposal and may terminate negotiations if they are not successful.

If MaineDOT determines that a public-private partnership proposal and related agreement negotiated with the private entity are acceptable, the Maine Legislature must approve the agreement.

Subsection 10-A of Section 4251 provides that certain information submitted to MaineDOT relating to a public-private partnership proposal is confidential and not subject to disclosure as a "public record" under Maine's Freedom of Access Act (FOAA), if the private business entity designates the information as being only for the confidential use of MaineDOT and (a) the information is a trade secret, or (b) disclosure would result in a business or competitive disadvantage or other significant detriment to the business.

While Section 4251 has not yet resulted in any public-private partnership, the provisions of Section 4251 designating certain information as confidential are an essential element of any business relationship, including the public-partnerships contemplated by that statute. Maintaining the confidentiality of the records identified in Section 4251 will help ensure that any prospective public-private partnership proposals are not thwarted by concerns on the part of participating business entities that their sensitive, proprietary business information will be divulged to potential competitors.

Section 4251 is not unique in preserving the confidentiality of business information. Other Maine laws do likewise. For example, 5 MRSA §13119-A makes certain business records under programs administered by the Maine Department of Economic & Community Development (DECD) confidential, including information in a business or marketing plan or grant application when the business designates it as confidential and DECD determines that the information should remain confidential to give its owner a competitive advantage and prevent it from losing business or suffering other significant detriment if the information were disclosed. Maine's Small Enterprise Growth Program contains confidentiality provisions similar to those in the DECD statute. See 10 MRSA §391(2). Likewise, the Maine law establishing the Maine International Trade Center (MITC) provides for confidentiality of information contained in business and marketing plans if confidentiality is requested by the business and the MITC determines that the information is proprietary and its disclosure would impair the competitive position of the MITC or the business. See 10 MRSA §945-J.

The provisions for preserving the confidentiality of business information set out in 23 MRSA §4251(10-A) reflect the policy of other Maine laws that make sensitive business information confidential. Section 4251(10-A) and these other Maine laws recognize that disclosure of a business's trade secrets and other proprietary information can put the business at a competitive disadvantage and result in the loss of business and other detriment to the business. These laws are intended to promote alliances between businesses and governmental or quasi-governmental agencies and thereby boost economic development in Maine. Without statutory protection from disclosure of their sensitive business information, businesses would be highly unlikely to engage in such alliances.

An additional consideration comes into play in preserving the confidentiality of business records under 23 MRSA §4251(10-A). As noted above, legislative approval of a public-private partnership for transportation projects formed under Section 4251 is required. Section 402(3)(C) of FOAA excepts from the definition of "public record" legislative papers and reports and other legislative documents until signed and publicly distributed. It would be incongruous to permit the disclosure of sensitive business information during negotiations between the MaineDOT and a business enterprise when legislative materials prepared in connection with legislative consideration of a public-private partnership between MaineDOT and a business must be kept confidential.

The policy of preserving the confidentiality of certain business information is also reflected in the Maine Rules of Evidence (MRE) and the Maine Rules of Civil Procedure (MRCP). MRE Rule 507 provides that a person "has a privilege to refuse to disclose, and to prevent any other person from disclosing, a trade secret that the person owns." This privilege can be asserted in any court proceeding. Likewise, MRCP Rule 26(c) dealing with discovery allows a person to seek an order from the court to prevent "a trade secret or other confidential research, development, or commercial information" from disclosure during discovery in connection with a court proceeding. The inclusion of a trade secrets privilege in the MRE and the inclusion of a provision in the MRCP allowing sensitive business information to be shielded from discovery underscore the importance of maintaining the confidentiality of proprietary business information. These protections are reflected in FOAA, which contains an exclusion from the definition of "public records" in Section 402(3)(B) for records that would be within the scope of a privilege against discovery or use as evidence in a court proceeding if the records are sought in connection with the court proceeding. It is important to note that the protection from disclosure offered by Section 402(3)(B) is available only in connection with a court proceeding.

For the reasons discussed above, it is MaineDOT’s view that the confidentiality provisions of 23 MRSA §4251(10-A) should be maintained without change.

STATUTE: 23 MRSA §8115-A

AGENCY: Northern New England Passenger Rail Authority

CONTACT PERSON: William Gayle

RETURN BY: September 30, 2022

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 22 through 24-A; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

In its last review the committee considered this exception and concluded the exception was warranted. The reasons for the exception have not changed. Since at least 2019 NNEPRA has not received any FOA requests for records within this exception. Records within this exception are:

1. ***Confidential records.*** *The following records of the authority are confidential:*
   A. Records and correspondence relating to negotiations of agreements to which the authority is a party or in which the authority has a financial or other interest. Once entered into, an agreement is not confidential;
   B. Trade secrets;
   C. Estimates prepared by or at the direction of the authority of the costs of goods or services to be procured by or at the expense of the authority; and
   D. Any documents or records solicited or prepared in connection with employment applications, except that applications, resumes and letters and notes of reference, other than those letters and notes of reference expressly submitted in confidence, pertaining to the applicant hired are public records after the applicant is hired, except that personal contact information is not a public record as provided in Title 1, section 402, subsection 3, paragraph O.

2. Lawyer-client privilege. *The authority may claim the lawyer-client privilege in the same manner and circumstances as a corporation is authorized to do so.*

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

NNEPRA supports the continuation of the exception for the following reasons:

Records with relating to negotiations of agreements (1A) - NNEPRA is a party to numerous agreements that pertain to different aspects of the Downeaster passenger rail service. In addition, NNEPRA has a financial and/or other interest in certain other agreements to which NNEPRA is not a named party but which pertain to an aspect of the service. With the passage of time, existing agreements expire and must be renewed or replaced, and new agreements must be entered into as the service is improved or expanded. NNEPRA's ability to negotiate favorable, cost-effective agreements would be severely undermined if NNEPRA's records relating to negotiations are publicly available. And because of the similarity of many of the agreements that NNEPRA enters into, it is important that the confidentiality of records relating to negotiations continue so long as the service is operating.

Trade secrets (1B) – NNEPRA enters into agreements and contracts with contractors and vendors who may have proprietary information that may be considered a trade secret. If those trade secrets are not protected, NNEPRA will have difficulty entering into agreements necessary to carry out its statutory responsibilities.

Estimates of services and goods (1C) - NNEPRA often obtains estimates of costs of goods or services that it intends to procure or that others will procure at NNEPRA's expense. NNEPRA's ability to obtain competitive, cost-effective proposals for goods and services would be severely undermined if NNEPRA's estimates are publicly available. And because of the similarity of many of NNEPRA's procurements, it is important that the confidentiality of estimates continue so long as the service is operating.

Employee applications (1D) - Employment applications are personal and private information to the individual submitting their information for a possible position and should continue to be protected under this statute.

Lawyer – Client Privilege (2) - NNEPRA functions in many respects like a private corporation, in a competitive business environment. NNEPRA needs to have the same ability that private corporations have to consult in confidence with its lawyers regarding pending or threatened litigation, as well as on the wide variety of legal issues that arise in the course of NNEPRA's activities.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

The current language is sufficiently clear.

4. Does your agency recommend changes to this exception?

NNEPRA does not recommend changes to this exception.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

N/A

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

NNEPRA operates in a highly-competitive business environment characterized by a limited number of available business partners and vendors. This exception allow NNEPRA to negotiate favorable, cost-effective agreements (and amendments to existing, long-term agreements) and obtain competitive prices in subsequent procurements of goods or services that would be compromised in the absence of the exception.

STATUTE: 24 MRSA §2302-A, sub-§3

AGENCY: Maine Bureau of Insurance

CONTACT PERSON: Ben Yardley

RETURN BY: September 30, 2022

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 22 through 24-A; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

This section instructs nonprofit hospital or medical service organizations not to identify the names of health care patients in annual reports of utilization review activities that these entities file with the Bureau. Currently no hospital or medical service organizations are authorized to operate in Maine. To the best of our knowledge and belief, we have not received a FOAA request that would be subject to this provision.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

The Bureau supports continuation of this provision to protect patients' personal health information should a nonprofit hospital or medical service organization become authorized in Maine.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

No problems are noted. It is clear that personal health information is intended to be subject to protection under both state and federal law. The statute is sufficiently clear.

4. Does your agency recommend changes to this exception?
The Bureau does not recommend any changes to this exception.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.
None. No currently regulated entities are subject to this exception.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.
n/a

STATUTE: 24 MRSA §2307, sub-§3

AGENCY: Maine Bureau of Insurance

CONTACT PERSON: Ben Yardley

RETURN BY: September 30, 2022

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 22 through 24-A; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

This public records exception makes confidential the work papers of Bureau examiners conducting examinations of nonprofit hospital or medical service organizations or nonprofit health care plans to be confidential. Currently, Maine has one nonprofit health care plan subject to examination. To the best of our knowledge, the Bureau has not applied this exception in denying a request for production of records.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

The Bureau strongly supports continuation of this exception. Protection of examination work papers is essential to the ability of agency examiners to access any and all records of insurers and similar entities. This protection is recognized in all jurisdictions and is a national accreditation standard for insurance regulators.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the

FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

No problems have occurred in the application of this exception. We believe it clear that the records are intended to be confidential, and the language of the exception is sufficiently clear.

4. Does your agency recommend changes to this exception?

The Bureau does not recommend any changes to this exception.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

Maine Dental Service Corporation d/b/a Delta Dental

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

n/a

STATUTE: 24 MRSA §2329, sub-§8

AGENCY: Maine Bureau of Insurance

CONTACT PERSON: Ben Yardley

RETURN BY: September 30, 2022

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 22 through 24-A; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

This exception provides that the substance use disorder treatment patient records of nonprofit hospital and medical service organization records are confidential in the context of required annual reports as to the organization's alcoholism and substance abuse claims experience. Maine currently has no regulated entities in this category.

This exception was revised by Public Law 2017 Chapter 407 to broaden the category of confidential records from "alcohol and drug" treatment records to "substance use disorder" records.

To the best of our knowledge, the Bureau has not applied this exception in denying a request for production of records.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

We support the continuation of this protection of personal health information. Patients should have confidence that their records will be confidential when these organizations make their annual reports to the Bureau.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

No problems have occurred in the application of this exception. We believe that intended protection of personal health information is clear under state and federal law, The statute is sufficiently clear.

4. Does your agency recommend changes to this exception?

No.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

None.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

n/a

STATUTE: 24 MRSA §2510, sub-§1

AGENCY: Office of Professional and Occupational Regulation

CONTACT PERSON: Kristin Racine

RETURN BY: September 30, 2022

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 22 through 24-A; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

4. Does your agency recommend changes to this exception?

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

STATUTE: 24 MRSA §2510, sub-§1 and 24 MRSA § 2510-A

AGENCY: Office of Professional and Occupational Regulation

CONTACT PERSON: Kristin Racine

RETURN BY: September 30, 2022

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 22 through 24-A; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

Response: OPOR staff does not have data regarding administering or applying this public records exception in response to a FOAA request.

Licensees and/or applicants for licensure under the jurisdiction of the Maine Pharmacy Board and the Maine Veterinary Board may be directed, as the result of a Decision and Order after an adjudicatory hearing, or, voluntarily as part of entering into a consent agreement, to submit to regular monitoring and testing administered by the Maine Medical Association Medical Professionals Health Program ("MPHP"). The monitoring and/or testing in those circumstances would be a condition of probation, which is a permissible form of discipline that may be imposed by a Board for the grounds enumerated in a Board's statute and/or 10 M.R.S. § 8003(5-A)(A). Therefore, these exception(s) may be cited in response to a FOAA request for a licensee's file containing such records, in addition to the other provisions that would protect disclosure of personally identifiable health information and/or treatment records pursuant to, *inter alia*, 22 M.R.S. § 1711-C.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

Response: OPOR supports the continued use of the exception(s) to ensure patient health information remains protected and private. The exception(s) encourage licensees to engage with professional review committees since the reports it issues are confidential, and these exception(s) provide additional protection in addition to the other various federal and state confidentiality laws.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

Response: To date, OPOR has not encountered problems in applying the exception(s).

4. Does your agency recommend changes to this exception?

Response: OPOR does not recommend any changes to the exception(s).

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

Response: Additional stakeholders would include legal counsel for the OPOR regulatory programs which is provided by various Assistant Attorneys General within the Office of the Attorney General. Licensees and the Maine Professionals Health Program.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

Response: None at this time.

JANET T. MILLS
GOVERNOR

STATE OF MAINE
BOARD OF DENTAL PRACTICE
143 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0143

VIA:

ELECTRONIC MAIL: ***lindsay.laxon@legislature.maine.gov***

September 26, 2022

Lindsay J. Laxon, Esq.
Legislative Analyst
Office of Policy and Legal Analysis
Maine State Legislature
13 State House Station
Augusta, Maine 04333

RE: Right to Know Advisory Committee Request dated August 4, 2022

Dear Lindsay Laxon:

Please accept this communication as a follow up to an email you sent Kristin M. Racine, an attorney within the Office of Professional and Occupational Regulation ("OPOR"), on August 4, 2022. The request was to seek input from various licensure boards within OPOR as part of the committee's effort to complete its review of existing public records exceptions in 24 M.R.S. § 2510, sub-§1 (Reference 88) and 24 M.R.S. § 2510-A (Reference 89).

As you may know, the Board of Dental Practice ("the Board") is not a licensure board within OPOR. However, as an affiliated board within the Department of Professional and Financial Regulation ("DPFR"), I thought it would be helpful to provide you and/or the committee with the following responses to the questions posed regarding the Board's use of the exceptions noted above:

1. In addition to various federal and state confidentiality laws, the Board will also cite 24 M.R.S. § 2510 as exceptions to the production of public records, which includes but is not limited to:
    i. professional peer review records,
    ii. professional competence review records;
    iii. mandated reports to licensure boards by providers, entities and carriers; and
    iv. professional society reports.

    Generally speaking, the Board receives six (6) FOAA requests a year and again utilizes the exception provisions in Title 24, Chapter 21 when acknowledging a request. However, due to the nature of the requests, the records sought and produced are predominantly administrative records, not necessarily protected health information.

2. The Board supports the continued use of the exception(s) to ensure patient health information remains protected and private. The exception contained in 24 M.R.S. § 2510-A encourages licensees to engage with professional review committees since the reports it issues are confidential.

3. To date, the Board has not encountered problems in applying the exception(s).

4. The Board does not recommend any changes to the exception(s).

5. Additional stakeholders would include the Board's legal counsel which is provided by various Assistant Attorneys General within the Office of the Attorney General. Licensees, the Maine Medical Professionals Health Program, and the Maine Dental Association. I will assume that input from those groups will also be considered.

6. The Board does not have any information to offer other than what has been provided in this letter.

In closing, the Board supports the ongoing use of the public records exceptions provided in both 24 M.R.S. § 2510, sub-§1 and 24 M.R.S. § 2410-A. Should you have any questions regarding this response, please feel free to contact me.

Sincerely,

Penny Vaillancourt

Penny Vaillancourt
Executive Director

Cc: Nicole Sawyer, Assistant Attorney General
Kirstin M. Racine, Attorney, OPOR
File

Reference # 88

STATUTE: 24 MRSA §2510, sub-§1

AGENCY: Maine Board of Licensure in Medicine

CONTACT PERSON: Dennis E. Smith, Esq., Executive Director
dennis.e.smith@maine.gov (207) 287-3605

RETURN BY: September 30, 2022

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 22 through 24-A; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

24 M.R.S. §2510. Confidentiality of information
https://legislature.maine.gov/statutes/24/title24sec2510-1.html

1. Confidentiality; exceptions. Any reports, information or records received and maintained by the board pursuant to this chapter, including any material received or developed by the board during an investigation shall be confidential, except for information and data that is developed or maintained by the board from reports or records received and maintained pursuant to this chapter or by the board during an investigation and that does not identify or permit identification of any patient or physician; provided that the board may disclose any confidential information only:

A. In a disciplinary hearing before the board or in any subsequent trial or appeal of a board action or order relating to such disciplinary hearing;

B. To governmental licensing or disciplinary authorities of any jurisdiction or to any health care providers or health care entities located within or outside this State that are concerned with granting, limiting or denying a physician's privileges, but only if the board includes along with the transfer an indication as to whether or not the information has been substantiated by the board;

C. As required by section 2509, subsection 5;

D. Pursuant to an order of a court of competent jurisdiction;

E. To qualified personnel for bona fide research or educational purposes, if personally identifiable information relating to any patient or physician is first deleted; or

F. To other state or federal agencies when the information contains evidence of possible violations of laws enforced by those agencies.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

ANSWER

The Maine Board of Licensure in Medicine (BOLIM) is an occupational and professional licensing board affiliated with the Department of Professional and Financial Regulation (PFR). BOLIM was created in 1895. It licenses and regulates allopathic physicians and physician assistants. BOLIM's purpose is set by the Legislature:

> **10 M.R.S. §8008. Purpose of occupational and professional regulatory boards**
>
> The sole purpose of an occupational and professional regulatory board is to protect the public health and welfare. A board carries out this purpose by ensuring that the public is served by competent and honest practitioners and by establishing minimum standards of proficiency in the regulated professions by examining, licensing, regulating and disciplining practitioners of those regulated professions. Other goals or objectives may not supersede this purpose.

24 MRSA §2510, sub-§1 – the confidentiality provision being reviewed – is but one part of the Maine Health Security Act (MHSA) (24 M.R.S. Chapter 21) https://legislature.maine.gov/statutes/24/title24sec2501-1.html. The Legislature enacted the MHSA in order to reduce the cost of health care in Maine and increase the quality of care delivered to Maine patients by: (1) encouraging "peer review" by health care professionals and health care entities of the medical care provided by physicians and physician assistants; (2) defining "peer review" committees and activities to promote the review of health care provided; (3) mandating licensed physicians and physician assistants to report to BOLIM any physician or physician assistant who engages in gross or repeated negligence, misuse of drugs, professional incompetence, unprofessional conduct or sexual misconduct; and (4) mandating health care entities (i.e. hospitals) to report to BOLIM the name of any licensed physician or physician assistant whose employment, including employment through a 3rd party, or privileges have been revoked, suspended, limited or terminated or who resigned while under investigation or to avoid investigation for reasons related to clinical competence or unprofessional conduct, together with pertinent information relating to that action.

BOLIM is mandated to investigate complaints and reports filed with it pursuant to 24 M.R.S. §§ 2505 & 2506. Each of those laws provides:

24 M.R.S. §2505. Committee and other reports
https://legislature.maine.gov/statutes/24/title24sec2505-1.html

Any professional competence committee within this State and any physician or physician assistant licensed to practice or otherwise lawfully practicing within this State shall, and any other person may, report the relevant facts to the appropriate board relating to the acts of any physician or physician assistant in this State if, in the opinion of the committee, physician, physician assistant or other person, the committee or individual has reasonable knowledge of acts of the physician or physician assistant amounting to gross or repeated medical malpractice, misuse of alcohol, drugs or other substances that may result in the physician's or the physician assistant's performing services in a manner that endangers the health or safety of patients, professional incompetence, unprofessional conduct or sexual misconduct identified by board rule. The failure of any such professional competence committee or any such physician or physician assistant to report as required is a civil violation for which a fine of not more than $1,000 may be adjudged.

Except for specific protocols developed by a board pursuant to Title 32, section 2596-A, 3298 or 18323, a physician or physician assistant, dentist or committee is not responsible for reporting misuse of alcohol, drugs or other substances or professional incompetence or malpractice as a result of physical or mental infirmity or by the misuse of alcohol, drugs or other substances discovered by the physician, physician assistant, dentist or committee as a result of participation or membership in a professional review committee or with respect to any information acquired concerning misuse of alcohol, drugs or other substances or professional incompetence or malpractice as a result of physical or mental infirmity or by the misuse of alcohol, drugs or other substances, as long as that information is reported to the professional review committee. This section does not prohibit an impaired physician, physician assistant or dentist from seeking alternative forms of treatment.

The confidentiality of reports made to a board under this section is governed by this chapter.

§2506. Provider, entity and carrier reports
https://legislature.maine.gov/statutes/24/title24sec2506-1.html

A health care provider or health care entity shall, within 60 days, report in writing to the disciplined practitioner's board or authority the name of any licensed, certified or registered employee or person privileged by the provider or entity whose employment, including employment through a 3rd party, or privileges have been revoked, suspended, limited or terminated or who resigned while under investigation or to avoid investigation for reasons related to clinical competence or unprofessional conduct, together with pertinent information relating to that action. Pertinent information includes: a description of the adverse action; the name of the practitioner involved; the date, the location and a description of the event or events giving rise to the adverse action; and identification of the complainant giving rise to the adverse action. Upon written request, the following information must be released to the board or authority

> within 20 days of receipt of the request: the names of the patients whose care by the disciplined practitioner gave rise to the adverse action; medical records relating to the event or events giving rise to the adverse action; written statements signed or prepared by any witness or complainant to the event; and related correspondence between the practitioner and the provider or entity. The report must include situations in which employment, including employment through a 3rd party, or privileges have been revoked, suspended, limited or otherwise adversely affected by action of the health care practitioner while the health care practitioner was the subject of a proceeding regarding employment or a disciplinary proceeding, and it also must include situations where employment, including employment through a 3rd party, or privileges have been revoked, suspended, limited or otherwise adversely affected by act of the health care practitioner in return for the health care provider's or health care entity's terminating such proceeding. Any reversal, modification or change of action reported pursuant to this section must be reported immediately to the practitioner's board or authority, together with a brief statement of the reasons for that reversal, modification or change. If the adverse action requiring a report as a result of a reversal, modification or change of action consists of the revocation, suspension or limitation of employment, including employment through a 3rd party, or clinical privileges of a physician, physician assistant or advanced practice registered nurse by a health care provider or health care entity for reasons relating to clinical competence or unprofessional conduct and is taken pursuant to personnel or employment rules or policies, medical staff bylaws or other credentialing and privileging policies, whether or not the practitioner is employed by that health care provider or entity, then the provider or entity shall include in its initial report to the disciplined practitioner's licensing board or authority the names of all patients whose care by the disciplined practitioner gave rise to the adverse action. The failure of any health care provider or health care entity to report as required is a civil violation for which a fine of not more than $5,000 may be adjudged.
>
> Carriers providing managed care plans are subject to the reporting requirements of this section when they take adverse actions against a practitioner's credentials or employment for reasons related to clinical competence or unprofessional conduct that may adversely affect the health or welfare of the patient.

When BOLIM receives mandated reports pursuant to 24 M.R.S. §§ 2505 and 2506, those reports contain confidential "peer review" information.

Eliminating the confidentiality provision of 24 M.R.S. § 2510 would essentially eliminate the confidentiality of "peer review" information – including opinions of physicians and others performing evaluations of questionable or substandard medical care and treatment provided by physicians and physician assistants. It would lead to a "chilling effect" upon physicians and health care entities to conduct peer reviews as the information could then be used in civil malpractice suits (litigation) against the health care entity conducting the per review as well as the physician who voluntarily agrees to undergo peer review: The exact opposite of the intent of the Maine Health Security Act – which was to promote and encourage review of physician and physician assistant delivery of care and thereby improve patient care. Likewise, eliminating the confidentiality provision could also lead to a "chilling effect" on mandated reports filed by physicians and health care entities with BOLIM, which could compromise patient safety as

incompetent and unprofessional care is not reported to BOLIM for investigation and action.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

ANSWER

BOLIM supports the continuation of this exception for the reasons outlined above. The language is clear that "peer review" information and mandated reports to the BOLIM are confidential with limited exceptions for health care oversight activities by health care entities, health care licensing boards, and other governmental agencies.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

ANSWER

BOLIM has had no issues in the application of this exception. Typically, law firms and attorneys seek this information during anticipated or ongoing civil litigation (i.e. medical malpractice), which is clearly prohibited by the confidentiality of peer review information and the purposes of the MHSA.

4. Does your agency recommend changes to this exception?

ANSWER

BOLIM does not recommend any changes to this exception.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

ANSWER

BOLIM identifies the following stakeholders:

1. All Maine Health and Dental Insurance Carriers
2. The Maine Bureau of Insurance
3. The Governor's Office
4. The Maine Attorney General's Office
5. All Maine Health Care Systems and Hospitals (i.e. MaineHealth; Northern Light-Eastern Maine Medical Center; etc.)
6. The Maine Hospital Association

7. The Maine Medical Association
8. The Maine Association of Physician Assistants
9. Gordon Smith, Esq.
10. The Veterans Administration Medical Centers (Togus VA)
11. All Federally Qualified Health Centers located in Maine
12. All Maine State Nursing Schools
13. All Maine State Schools of Allied Health
14. The University of New England

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

ANSWER

BOLIM has attached certain committee files, legislation, and amendments regarding the MHSA to this memo.

STATUTE: 24 MRSA §2510-A

AGENCY: Maine Board of Licensure in Medicine

CONTACT PERSON: Dennis E. Smith, Esq., Executive Director
dennis.e.smith@maine.gov (207) 287-3605

RETURN BY: September 30, 2022

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 22 through 24-A; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

24 M.R.S. §2510-A. Confidentiality of professional competence review records
https://legislature.maine.gov/statutes/24/title24sec2510-A.html

Except as otherwise provided by this chapter, all professional competence review records are privileged and confidential and are not subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity and are not admissible as evidence in any civil, judicial or administrative proceeding. Information contained in professional competence review records is not admissible at trial or deposition in the form of testimony by an individual who participated in the written professional competence review process. Nothing in this section may be read to abrogate the obligations to report and provide information under section 2506, nor the application of Title 32, sections 2599 and 3296.

1. Protection; waiver. This chapter's protection may be invoked by a professional competence committee or by the subject of professional competence review activity in any civil, judicial or administrative proceeding. This section's protection may be waived only by a written waiver executed by an authorized representative of the professional competence committee.

2. Adverse professional competence review action. Subsection 1 does not apply in a proceeding in which a physician contests an adverse professional competence review action against that physician, but the discovery, use and introduction of professional competence review records in such a proceeding does not constitute a waiver of Subsection 1 in any other or subsequent proceedings seeking damages for alleged professional negligence against the physician who is the subject of such professional competence review records.

3. Defense of professional competence committee. Subsection 1 does not apply in a proceeding in which a professional competence committee uses professional competence review records in its own defense, but the discovery, use and introduction of professional competence review records in such a proceeding does not constitute a waiver of subsection 1 in the same or other proceeding seeking damages for alleged professional negligence against the physician who is the subject of such professional competence review records.

4. Waiver regarding individual. Waiver of subsection 1 in a proceeding regarding one physician does not constitute a waiver of subsection 1 as to other physicians.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

ANSWER

The Maine Board of Licensure in Medicine (BOLIM) is an occupational and professional licensing board affiliated with the Department of Professional and Financial Regulation (PFR). BOLIM was created in 1895. It licenses and regulates allopathic physicians and physician assistants. BOLIM's purpose is set by the Legislature:

> **10 M.R.S. §8008. Purpose of occupational and professional regulatory boards**
>
> The sole purpose of an occupational and professional regulatory board is to protect the public health and welfare. A board carries out this purpose by ensuring that the public is served by competent and honest practitioners and by establishing minimum standards of proficiency in the regulated professions by examining, licensing, regulating and disciplining practitioners of those regulated professions. Other goals or objectives may not supersede this purpose.

24 MRSA §2510-A – the confidentiality provision being reviewed – is but one part of the Maine Health Security Act (MHSA) (24 M.R.S. Chapter 21) https://legislature.maine.gov/statutes/24/title24sec2501-1.html. The Legislature enacted the MHSA in order to reduce the cost of health care in Maine and increase the quality of care delivered to Maine patients by: (1) encouraging "peer review" by health care professionals and health care entities of the medical care provided by physicians and physician assistants; (2) defining "peer review" committees and activities to promote the review of health care provided; (3) mandating licensed physicians and physician

assistants to report to BOLIM any physician or physician assistant who engages in gross or repeated negligence, misuse of drugs, professional incompetence, unprofessional conduct or sexual misconduct; and (4) mandating health care entities (i.e. hospitals) to report to BOLIM the name of any licensed physician or physician assistant whose employment, including employment through a 3rd party, or privileges have been revoked, suspended, limited or terminated or who resigned while under investigation or to avoid investigation for reasons related to clinical competence or unprofessional conduct, together with pertinent information relating to that action.

BOLIM is mandated to investigate complaints and reports filed with it pursuant to 24 M.R.S. §§ 2505 & 2506. Each of those laws provides:

> **24 M.R.S. §2505. Committee and other reports**
> **https://legislature.maine.gov/statutes/24/title24sec2505-1.html**
>
> Any professional competence committee within this State and any physician or physician assistant licensed to practice or otherwise lawfully practicing within this State shall, and any other person may, report the relevant facts to the appropriate board relating to the acts of any physician or physician assistant in this State if, in the opinion of the committee, physician, physician assistant or other person, the committee or individual has reasonable knowledge of acts of the physician or physician assistant amounting to gross or repeated medical malpractice, misuse of alcohol, drugs or other substances that may result in the physician's or the physician assistant's performing services in a manner that endangers the health or safety of patients, professional incompetence, unprofessional conduct or sexual misconduct identified by board rule. The failure of any such professional competence committee or any such physician or physician assistant to report as required is a civil violation for which a fine of not more than $1,000 may be adjudged.
>
> Except for specific protocols developed by a board pursuant to Title 32, section 2596-A, 3298 or 18323, a physician or physician assistant, dentist or committee is not responsible for reporting misuse of alcohol, drugs or other substances or professional incompetence or malpractice as a result of physical or mental infirmity or by the misuse of alcohol, drugs or other substances discovered by the physician, physician assistant, dentist or committee as a result of participation or membership in a professional review committee or with respect to any information acquired concerning misuse of alcohol, drugs or other substances or professional incompetence or malpractice as a result of physical or mental infirmity or by the misuse of alcohol, drugs or other substances, as long as that information is reported to the professional review committee. This section does not prohibit an impaired physician, physician assistant or dentist from seeking alternative forms of treatment.
>
> The confidentiality of reports made to a board under this section is governed by this chapter.
>
> **§2506. Provider, entity and carrier reports**
> **https://legislature.maine.gov/statutes/24/title24sec2506-1.html**
>
> A health care provider or health care entity shall, within 60 days, report in writing to the disciplined practitioner's board or authority the name of any licensed, certified or

registered employee or person privileged by the provider or entity whose employment, including employment through a 3rd party, or privileges have been revoked, suspended, limited or terminated or who resigned while under investigation or to avoid investigation for reasons related to clinical competence or unprofessional conduct, together with pertinent information relating to that action. Pertinent information includes: a description of the adverse action; the name of the practitioner involved; the date, the location and a description of the event or events giving rise to the adverse action; and identification of the complainant giving rise to the adverse action. Upon written request, the following information must be released to the board or authority within 20 days of receipt of the request: the names of the patients whose care by the disciplined practitioner gave rise to the adverse action; medical records relating to the event or events giving rise to the adverse action; written statements signed or prepared by any witness or complainant to the event; and related correspondence between the practitioner and the provider or entity. The report must include situations in which employment, including employment through a 3rd party, or privileges have been revoked, suspended, limited or otherwise adversely affected by action of the health care practitioner while the health care practitioner was the subject of a proceeding regarding employment or a disciplinary proceeding, and it also must include situations where employment, including employment through a 3rd party, or privileges have been revoked, suspended, limited or otherwise adversely affected by act of the health care practitioner in return for the health care provider's or health care entity's terminating such proceeding. Any reversal, modification or change of action reported pursuant to this section must be reported immediately to the practitioner's board or authority, together with a brief statement of the reasons for that reversal, modification or change. If the adverse action requiring a report as a result of a reversal, modification or change of action consists of the revocation, suspension or limitation of employment, including employment through a 3rd party, or clinical privileges of a physician, physician assistant or advanced practice registered nurse by a health care provider or health care entity for reasons relating to clinical competence or unprofessional conduct and is taken pursuant to personnel or employment rules or policies, medical staff bylaws or other credentialing and privileging policies, whether or not the practitioner is employed by that health care provider or entity, then the provider or entity shall include in its initial report to the disciplined practitioner's licensing board or authority the names of all patients whose care by the disciplined practitioner gave rise to the adverse action. The failure of any health care provider or health care entity to report as required is a civil violation for which a fine of not more than $5,000 may be adjudged.

Carriers providing managed care plans are subject to the reporting requirements of this section when they take adverse actions against a practitioner's credentials or employment for reasons related to clinical competence or unprofessional conduct that may adversely affect the health or welfare of the patient.

When BOLIM receives mandated reports pursuant to 24 M.R.S. §§ 2505 and 2506, those reports contain confidential "peer review" information.

Eliminating the confidentiality provision of 24 M.R.S. § 2510 would essentially eliminate the confidentiality of "peer review" information – including opinions of physicians and others performing evaluations of questionable or substandard medical care

and treatment provided by physicians and physician assistants. It would lead to a "chilling effect" upon physicians and health care entities to conduct peer reviews as the information could then be used in civil malpractice suits (litigation) against the health care entity conducting the per review as well as the physician who voluntarily agrees to undergo peer review: The exact opposite of the intent of the Maine Health Security Act – which was to promote and encourage review of physician and physician assistant delivery of care and thereby improve patient care. Likewise, eliminating the confidentiality provision could also lead to a "chilling effect" on mandated reports filed by physicians and health care entities with BOLIM, which could compromise patient safety as incompetent and unprofessional care is not reported to BOLIM for investigation and action.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

ANSWER

BOLIM supports the continuation of this exception for the reasons outlined above. The language is clear that "peer review" information and mandated reports to the BOLIM are confidential with limited exceptions for health care oversight activities by health care entities, health care licensing boards, and other governmental agencies.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

ANSWER

BOLIM has had no issues in the application of this exception. Typically, law firms and attorneys seek this information during anticipated or ongoing civil litigation (i.e. medical malpractice), which is clearly prohibited by the confidentiality of peer review information and the purposes of the MHSA.

4. Does your agency recommend changes to this exception?

ANSWER

BOLIM does not recommend any changes to this exception.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

ANSWER

BOLIM identifies the following stakeholders:

1. All Maine Health and Dental Insurance Carriers
2. The Maine Bureau of Insurance
3. The Governor's Office
4. The Maine Attorney General's Office
5. All Maine Health Care Systems and Hospitals (i.e. MaineHealth; Northern Light-Eastern Maine Medical Center; etc.)
6. The Maine Hospital Association
7. The Maine Medical Association
8. The Maine Association of Physician Assistants
9. Gordon Smith, Esq.
10. The Veterans Administration Medical Centers (Togus VA)
11. All Federally Qualified Health Centers located in Maine
12. The University of New England
13. All Maine Nursing Schools
14. All Maine Schools of Allied Health

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

ANSWER

BOLIM has attached certain committee files, legislation, and amendments regarding the MHSA to this memo.

L.D. 539

DATE: (Filing No. H-)

BUSINESS AND ECONOMIC DEVELOPMENT

Reproduced and distributed under the direction of the Clerk of the House.

STATE OF MAINE
HOUSE OF REPRESENTATIVES
118TH LEGISLATURE
FIRST SPECIAL SESSION

COMMITTEE AMENDMENT " " to H.P. 394, L.D. 539, Bill, "An Act to Clarify the Laws Regarding the Board of Licensure in Medicine and Ensure That Physician Discipline Is Reported to the Appropriate Licensing Board"

Amend the bill by striking out everything after the enacting clause and before the summary and inserting in its place the following:

'**Sec. 1. 5 MRSA §9057, sub-§6,** as amended by PL 1989, c. 175, §1, is further amended to read:

6. Confidential information. Information may be disclosed ~~which~~ that is confidential pursuant to Title 22, chapters 958-A and 1071 and sections 7703 and 1828; Title 24, section 2506; and Title 34-A, except for information, the disclosure of which is absolutely prohibited under Title 34-A, section 3003. Disclosure may be only for the determination of issues involving unemployment compensation proceedings relating to a state employee, state agency personnel actions and professional or occupational board licensure, certification or registration.

A. For the purpose of this subsection, "hearing officer" means presiding officer, judge, board chairman, arbitrator or any other person ~~deemed~~ considered responsible for conducting a proceeding or hearing subject to this subsection. In the case of the Civil Service Appeals Board, the presiding officer ~~shall be~~ is the entire board. "Employees of the agency" means employees of a state agency or department or members, agents or employees of a board who are directly related to and whose official duties involve the matter at issue.

B. The confidential information disclosed pursuant to this subsection is subject to the following limitations:

(1) The hearing officer determines that introduction of the confidential information is necessary for the determination of an issue before the hearing officer;

(2) During the introduction of confidential information, the proceeding is open only to the hearing officer, employees of the agency, parties, parties' representatives, counsel of record and the witness testifying regarding the information, and access to the information is limited to these people. Disclosure is limited to information directly related to the matter at issue;

(3) Witnesses ~~shall--be~~ are sequestered during the introduction of confidential information, except when offering testimony at the proceeding;

(4) The names or identities of reporters of confidential information or of other persons ~~shall~~ may not be disclosed, except when disclosure is deemed determined necessary and relevant by the hearing officer; and

(5) After hearing, the confidential information is sealed within the record and ~~shall~~ may not be further disclosed, except upon order of court.

Sec. 2. 24 MRSA §2502, sub-§§1-B and 2-A are enacted to read:

1-B. **Carrier.** "Carrier" has the same meaning as in Title 24-A, chapter 56-A.

2-A. **Managed care plan.** "Managed care plan" has the same meaning as in Title 24-A, chapter 56-A.

Sec. 3. 24 MRSA §2506, as amended by PL 1989, c. 462, §1, is further amended to read:

§2506. Provider and carrier reports

A health care provider shall, within 60 days, report in writing to the disciplined practitioner's board or authority the name of any licensed, certified or registered employee or person privileged by the provider whose employment or privileges have been revoked, suspended, limited or terminated or who resigned

while under investigation or to avoid investigation for reasons related to clinical competence or unprofessional conduct, together with pertinent information relating to that action. Pertinent information includes a description of the adverse action, the date, the location and a description of the event or events giving rise to the adverse action. Upon request, the following information must be released to the board or authority: medical records relating to the event or events; written statements signed or prepared by any witness or complainant to the event; and related correspondence between the practitioner and the provider. The report ~~shall~~ must include situations in which employment or privileges have been revoked, suspended, limited or otherwise adversely affected by action of the health care practitioner while the health care practitioner was the subject of disciplinary proceedings, and it also ~~shall~~ must include situations where employment or privileges have been revoked, suspended, limited or otherwise adversely affected by act of the health care practitioner in return for the health care provider terminating such proceeding. Any reversal, modification or change of action reported pursuant to this section ~~shall~~ must be reported immediately to the practitioner's board or authority, together with a brief statement of the reasons for that reversal, modification or change. The failure of any ~~such~~ health care provider to report as required is a civil violation for which a fine of not more than $1,000 may be adjudged.

Carriers providing managed care plans are subject to the reporting requirements of this section when they take adverse actions against a practitioner's credentials or employment for reasons related to clinical competence or unprofessional conduct that may adversely affect the health or welfare of the patient.

Sec. 4. 24 MRSA §2511, as amended by PL 1993, c. 600, Pt. A, §19, is further amended to read:

Any person acting without malice, any physician, podiatrist, health care provider, or professional society ~~or~~, any member of a professional competence committee, or professional review committee ~~or~~, any board or appropriate authority ~~is~~ and any entity required to report under this chapter are immune from civil liability:

Sec. 5. 32 MRSA §2954-B, sub-§1, as amended by PL 1993, c. 600, Pt. A, §185, is further amended to read:

1. License required. A physician assistant may not practice under the supervision of an osteopathic physician until the physician assistant has applied for and obtained a license issued by the Board of Osteopathic Licensure, which must be renewed ~~annually~~ biennially.

Sec. 6. 32 MRSA §2599, as amended by PL 1993, c. 600, Pt. A, §192, is further amended by adding at the end a new paragraph to read:

Provision of information protected by this section to the board pursuant to Title 24, section 2506 does not waive or otherwise affect the confidentiality of the records or the exemption from discovery provided by this section for any other purpose.

Sec. 7. 32 MRSA §3270-B, as amended by PL 1993, c. 600, Pt. A, §206, is further amended by repealing the headnote and replacing it with the following:

§3270-B. License and regulation

Sec. 8. 32 MRSA §3270-B, first ¶, as amended by PL 1993, c. 600, Pt. A, §206, is further amended to read:

A physician assistant is not permitted to practice until the physician assistant has applied for and obtained a ~~certificate of qualification~~ license issued by the Board of Licensure in Medicine, which must be renewed biennially, and a certificate of registration, ~~which must be renewed biannually~~. All applications for certificate of ~~qualification~~ registration must be accompanied by an application by the proposed supervisory physician, ~~which application~~ that must contain a statement that that physician is responsible for all medical activities of the physician assistant. The Board of Licensure in Medicine is authorized to adopt rules regarding the training and ~~certification~~ licensure of physician assistants and the agency relationship between the physician assistant and the supervising physician. Those rules may pertain, but are not limited, to the following matters:

Sec. 9. 32 MRSA §3270-B, sub-§1, as enacted by PL 1975, c. 680, §1, is amended to read:

1. Application information. The information to be contained in the application for a certificate of ~~qualification~~ registration;

Sec. 10. 32 MRSA §3270-B, sub-§11, as amended by PL 1993, c. 600, Pt. A, §206, is further amended to read:

11. Fees for biennial license renewal. Fees for the biennial ~~registration~~ license renewal of physician assistants in an amount not to exceed $100.

H. & S.

COMMITTEE AMENDMENT " " to H.P. 394, L.D. 539

Sec. 11. 32 MRSA §3286, 2nd ¶, as amended by PL 1993, c. 600, Pt. A, §219, is further amended to read:

For the purpose of this ~~section~~ chapter, by practicing or by making and filing a biennial license to practice medicine in this State, every physician licensed under this chapter who accepts the privilege to practice medicine in this State is deemed to have given consent to a mental or physical examination when directed in writing by the board and to have waived all objections to the admissibility of the examining physicians' testimony or examination reports on the grounds that the testimony or reports constitute a privileged communication.

Sec. 12. 32 MRSA §3296, as amended by PL 1993, c. 600, Pt. A, §223, is further amended by adding at the end a new paragraph to read:

Provision of information protected by this section to the board pursuant to Title 24, section 2506 does not waive or otherwise affect the confidentiality of the records or the exemption from discovery provided by this section for any other purpose.'

Further amend the bill by inserting at the end before the summary the following:

'FISCAL NOTE

The Board of Licensure in Medicine and the Board of Osteopathic Licensure, affiliated with the Department of Professional and Financial Regulation, will incur some minor additional costs to investigate complaints. These costs can be absorbed within the boards' existing budgeted resources.

Changing the licensure terms for physician assistants from annual to biennial will result in insignificant reductions of dedicated revenue to the Board of Osteopathic Licensure from license fees.'

SUMMARY

This amendment strikes the bill and enacts new language to clarify concerns on various sections. This amendment amends the Maine Revised Statutes, Title 5, section 9057, subsection 6 to apply the procedures for handling confidential information in administrative hearings to information provided to the boards of medicine and osteopathic licensure pursuant to Title 24, section 2506.

R & S.

COMMITTEE AMENDMENT " " to H.P. 394, L.D. 539

This amendment amends the Maine Health Security Act to include health maintenance organizations, preferred provider arrangements and similar organizations as entities that must report practitioner discipline related to clinical competence or unprofessional conduct and to apply the immunities provided by the Maine Health Security Act to these organizations. This amendment clarifies when a report pursuant to the Maine Health Security Act must be made to the Board of Licensure in Medicine and the Board of Osteopathic Licensure and what information related to the report must be provided to the boards.

This amendment changes the licensure of the physician assistants under the supervision of the Board of Osteopathic Licensure from annual to biennial.

This amendment clarifies that the exemption from discovery does not apply to information that must be reported to the boards pursuant to Title 24, section 2506. This amendment applies only to the Board of Licensure in Medicine and the Board of Osteopathic Licensure and the materials protected by Title 32, section 2599 and section 3296 remain confidential for all other purposes.

This amendment clarifies that physician assistants are licensed to practice and are registered with the Board of Licensure in Medicine under a supervisory physician. This amendment also clarifies the board's authority to require licensees to submit to mental or physical examination.

This amendment also adds a fiscal note to the bill.

ACTIVITY SHEET

COMMITTEE ON: BUSINESS & ECONOMIC DEVELOPMENT

L.D. #: 539

TITLE: AN ACT to Clarify the Laws Regarding the Board of Licensure in Medicine and Ensure That Physician Discipline Is Reported to the Appropriate Licensing Board.

HEARING DATE: March 6, 1997

WORK SESSION DATES: March 11, 1997

March 24, 1997

REPORTED OUT DATE: May 5, 1997

COMMITTEE REPORT: OUGHT TO PASS AS AMENDED BY COMMITTEE AMENDMENT " ".

(Unanimous)

118th MAINE LEGISLATURE

FIRST REGULAR SESSION-1997

Legislative Document **No. 539**

H.P. 394 House of Representatives, January 28, 1997

An Act to Clarify the Laws Regarding the Board of Licensure in Medicine and Ensure That Physician Discipline Is Reported to the Appropriate Licensing Board.

Submitted by the Department of Professional and Financial Regulation pursuant to Joint Rule 204.

Reference to the Committee on Business and Economic Development suggested and ordered printed.

Joseph W. Mayo

JOSEPH W. MAYO, Clerk

Presented by Representative VIGUE of Winslow.
Cosponsored by Senator LONGLEY of Waldo and
Representatives: AHEARNE of Madawaska, BARTH of Bethel, MERES of Norridgewock, USHER of Westbrook.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 24 MRSA §2502, sub-§2-A is enacted to read:

2-A. Health maintenance organization. "Health maintenance organization" means an organization defined by and subject to Title 24-A, chapter 56.

Sec. 2. 24 MRSA §2502, sub-§3-A is enacted to read:

3-A. Preferred provider organization. "Preferred provider organization" means an arrangement between an insurer or administrator and preferred providers that is defined by and subject to Title 24-A, chapter 32.

Sec. 3. 24 MRSA §2506, as amended by PL 1989, c. 462, §1, is further amended to read:

§2506. Provider reports

A health care provider shall, within 60 days, report in writing to the disciplined practitioner's board or authority the name of any licensed, certified or registered employee or person privileged by the provider whose employment or privileges have been revoked, suspended, limited ~~or~~, terminated, or who resigned while under investigation or to avoid investigation, together with ~~pertinent information~~ all information and records relating to that action. The report ~~shall~~ must include situations in which employment or privileges have been revoked, suspended, limited or otherwise adversely affected by action of the health care practitioner while the health care practitioner was the subject of disciplinary proceedings, and it also ~~shall~~ must include situations where employment or privileges have been revoked, suspended, limited or otherwise adversely affected by act of the health care practitioner in return for the health care provider terminating such proceeding. Any reversal, modification or change of action reported pursuant to this section ~~shall~~ must be reported immediately to the practitioner's board or authority, together with a brief statement of the reasons for that reversal, modification or change. The failure of any such health care provider to report as required is a civil violation for which a fine of not more than $1,000 may be adjudged.

Health maintenance organizations, preferred provider organizations and similar organizations are subject to the reporting requirements of this section when they take adverse action against a physician's privileges, credentials or employment for reasons related to clinical competence or unprofessional conduct.

Sec. 4. 32 MRSA §3270-B, as amended by PL 1993, c. 600, Pt. A, §206, is further amended by repealing the headnote and replacing it with the following:

§3270-B. License and regulation

Sec. 5. 32 MRSA §3270-B, first ¶, as amended by PL 1993, c. 600, Pt. A, §206, is further amended to read:

A physician assistant is not permitted to practice until the physician assistant has applied for and obtained a ~~certificate of qualification~~ license issued by the Board of Licensure in Medicine, which must be renewed biennially, and a certificate of registration, ~~which must be renewed biannually~~. All applications for certificate of ~~qualification~~ registration must be accompanied by an application by the proposed supervisory physician, ~~which application~~ that must contain a statement that that physician is responsible for all medical activities of the physician assistant. The Board of Licensure in Medicine is authorized to adopt rules regarding the training and ~~certification~~ licensure of physician assistants and the agency relationship between the physician assistant and the supervising physician. Those rules may pertain, but are not limited, to the following matters:

Sec. 6. 32 MRSA §3270-B, sub-§11, as amended by PL 1993, c. 600, Pt. A, §206, is further amended to read:

11. Fees for biennial license renewal. Fees for the biennial ~~registration~~ license renewal of physician assistants in an amount not to exceed $100.

Sec. 7. 32 MRSA §3286, 2nd ¶, as amended by PL 1993, c. 600, Pt. A, §219, is further amended to read:

For the purpose of this ~~section~~ chapter, by practicing or by making and filing a biennial license to practice medicine in this State, every physician licensed under this chapter who accepts the privilege to practice medicine in this State is deemed to have given consent to a mental or physical examination when directed in writing by the board and to have waived all objections to the admissibility of the examining physicians' testimony or examination reports on the grounds that the testimony or reports constitute a privileged communication.

Sec. 8. 32 MRSA §3296, as amended by PL 1993, c. 600, Pt. A, §223, is further amended by adding at the end a new paragraph to read:

The exemptions from discovery under this section do not apply to the identification of an affected practitioner or the

primary source materials utilized in the proceedings, which must be reported to the board pursuant to Title 24, section 2506.

SUMMARY

This bill amends the Maine Revised Statutes, Title 24, chapter 21, the Maine Health Security Act, to include health maintenance organizations, preferred provider arrangements and similar organizations as entities that must report practitioner discipline related to clinical competence or unprofessional conduct.

The bill also amends Title 32, chapter 48, the laws regarding the Board of Licensure in Medicine, to clarify that physician assistants are licensed to practice and are registered with the board, under a supervisory physician. The bill also clarifies the board's authority to require licensees to submit to mental or physical examination.

STATE OF MAINE
118TH LEGISLATURE

LEGISLATIVE NOTICES

JOINT STANDING COMMITTEE ON BUSINESS AND ECONOMIC DEVELOPMENT

Sen. John T. Jenkins, Senate Chair
Rep. Marc J. Vigue, House Chair

PUBLIC HEARING: Thursday, March 6, 1997, 9:00 am, Room 113 State Office Building

(L.D. 904) Bill "An Act to Clarify the Audit Requirement of the Maine State Housing Authority" (H.P.0651) (Presented by Representative ROWE of Portland) (Cosponsored by Senator HARRIMAN of Cumberland, Representative DONNELLY of Presque Isle, Representative KONTOS of Windham)

(L.D. 550) Bill "An Act to Ensure Fairness to Merchants under an Implied Warranty of Merchantability" (H.P.0405) (Presented by Representative BUCK of Yarmouth) (Cosponsored by Senator BUTLAND of Cumberland, Representative FISK, JR. of Falmouth, Representative LEMAIRE of Lewiston, Representative PINKHAM of Lamoine, Representative SAMSON of Jay, Representative THOMPSON of Naples, Representative VIGUE of Winslow)

(L.D. 539) Bill "An Act to Clarify the Laws Regarding the Board of Licensure in Medicine and Ensure That Physician Discipline Is Reported to the Appropriate Licensing Board" (H.P.0394) (Presented by Representative VIGUE of Winslow) (Cosponsored by Senator LONGLEY of Waldo, Representative AHEARNE of Madawaska, Representative BARTH, JR. of Bethel, Representative MERES of Norridgewock, Representative USHER of Westbrook) Submitted by the Department of Professional and Financial Regulation pursuant to Joint Rule 204.

(L.D. 841) Bill "An Act to Amend the Dental Licensure Laws to Authorize Special Permits for Instruction in Dentistry and to Identify and Rehabilitate Impaired Dentists" (H.P.0616) (Presented by Representative CAMERON of Rumford) (Cosponsored by Senator JENKINS of Androscoggin, Representative VIGUE of Winslow) Submitted by the Department of Professional and Financial Regulation pursuant to Joint Rule 204.

CONTACT PERSON: Diane White
115 State House Station
Augusta, ME 04333-0115
287-1331

TESTIMONY SIGN IN SHEET

COMMITTEE ON BUSINESS & ECONOMIC DEVELOPMENT

L.D. # ~~OR CONFIRMATION~~: 539

DATE: March 6, 1997

NAME	TOWN/AFFILIATION	PROPONENT	OPPONENT
1. Sandy Suttle	BOL/A	X	
2.	MMA	X	
3. Kelly Miller	MOA		
4. Joe Mayo	Hallowell	X	
5. Tony MacLean	BCBSME	X	
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TESTIMONY SIGN IN SHEET

COMMITTEE ON BUSINESS & ECONOMIC DEVELOPMENT

L.D. # ~~OR CONFIRMATION~~: 539

DATE: March 6, 1997

NAME	TOWN/AFFILIATION	PROPONENT	OPPONENT
1. Rep. Tom Murphy	(presentor for sponsor)		
2. Sandy Tuttle	Bd. of Licensure in Med.	✓	
3. Gordon Smith	Me. Medical Assn.	✓	
4. Kelly Miller	Me. Osteopathic Assn.	✓	
5. Joe Mackey	Health Source Maine	✓	
6. Andy McKean	BC-BS of Me.	✓	
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BOARD OF LICENSURE IN MEDICINE
TESTIMONY REGARDING LD # 539
before the
BUSINESS AND ECONOMIC DEVELOPMENT COMMITTEE
of the FIRST SESSION OF THE 118TH LEGISLATURE
MARCH 6, 1997

Good morning Senator Jenkins, Rep. Vigue, and members of the committee. I am Sandra Tuttle, public member of the Board of Licensure in Medicine living in Bath. I appreciate the opportunity to appear before you to provide testimony today, representing a consensus of all members of the Board of Licensure in Medicine, in support of LD 539.

Dr. Edward David, the chairman of the Board, whom you met recently when he explained to the members of this committee the functions of the Board, extends his sincere regret for being unable to attend today's session. He was called out of town on another professional matter.

As you may recall from Dr. David's presentation, the Legislature in 1895 created the Board of Registration of Medicine. That 6 member Board, made up of licensed professionals, was charged to protect the public health and welfare by assuring that practitioners of medicine and surgery were properly qualified, and to discipline as necessary. Even then, in order to practice medicine in this state the candidate had to successfully complete a rigorous training regimen and demonstrate, through an internship arrangement, the capability and knowledge to be a physician or surgeon.

The charge of the Board remains the same today. As stated in the strategic plan presented to you last month the mission of the Board is:

> to safeguard the health, welfare, safety, and lives of the people of Maine by ensuring that the public is served by competent and honest practitioners.

Over time, and as the health care environment has changed, the structure of the Board has also changed. Today the Board is comprised of 7 qualified physicians and 3 public members. This 10 member Board has the highest percentage of public member representation of any professional Board in Maine.

Established by legislation in MRSA 32 (The Professions and Occupations Act) and MRSA 24 (The Health Practices Act), the Board is affiliated with the Department of Professional and Financial Regulation in order to provide continuity of communication, budget coordination, and administrative representation. This organization type resembles the organizational model developed by the Federation of State Medical Boards of which this Board is a member. In fact, Federation studies show that this semi-autonomous (or affiliate) status results in higher levels of board discipline and more proactive oversight by the Board.

The overall result of this organizational structure is that the Board has seldom found the necessity of asking the Legislature to change the governing statutes. Our last request of significance was in 1987 to establish by statute an impaired physician program which provides for the rehabilitation of physicians suffering from substance abuse.

The proposed legislation encompassed in LD 539 will accomplish the following:

- First, the proposed language protects all citizens of Maine from "bad" physicians by clearly including all forms of managed care organizations as health care providers

who must, by current statute, report to the Board their discipline of a physician. It also clarifies the expectation regarding the information that must be provided concerning the disciplinary action. That information is confidential by MRSA 24.

- Second, the proposed language assists recruiting of health care professionals and aids communication with the consuming public by bringing the statutory language concerning Physician Assistants in line with current rules and practices recognizing separate licensure and physician supervision registration.
- Third, the proposed law clarifies the Board's authority to order physical and psychiatric evaluations of licensees when the Board has reason to question the fitness of the licensee to practice medicine.

A LITTLE BACKGROUND ON EACH ISSUE

First, REPORTING: MRSA 24, § 2506, requires that health care providers must report to the Board any physician "whose employment or privileges have been revoked, suspended, limited or otherwise adversely affected by action of the health care practitioner..." While the Board has always interpreted the law to include all forms of managed care within the expectation, the proposed language change will clearly include managed care organizations within the reporting requirement.

The language will also clarify what is to be reported. The intent it that final actions of the health care provider which takes action against a physician will be reported to the Board with enough detail information to allow the Board to do it's job. It is not the intent to in any way diminish the Peer Review process, including the confidentiality of Peer Review investigation, findings, and hearing. At a minimum the name of the physician, the nature of the problem, and the time period in which it occurred need to be reported. The Board feels that given this information it can carry out it's own independent evaluation without compromising the Peer Review process or the confidentiality of any patients involved.

However, some behaviors or competencies, when identified, are so egregious as to present a significant danger of potential harm to Maine citizens as patients. It is hoped that providers recognizing this will immediately report to the Board rather than delaying for the Peer Review process. Such behaviors should receive the full and immediate attention of the Board.

With the rapid growth of managed care in Maine as elsewhere in the nation, and with economics becoming more the driving force in health care decisions, the Board of Licensure becomes one of a very few regulatory bodies with the authority, ability, and access capabilities to deal with quality of care issues. The Board believes strongly that ultimately the physician must be held accountable for the quality of health care provided, and he/she cannot lean on employment status as a protection for failing to provide high quality patient care.

If the health care provider does not report it's actions regarding a physician to the Licensing Board, the only other source available to learn of such discipline is through the National Practitioner Data Bank, a Federal data bank of physician discipline. But the provider need not report actions of less than 30 days restriction or loss or privileges. Since a good deal of provider discipline of its credentialed physicians is less than 30 days, no one, not even the Board, will know about poor physician skills or behavior. Such knowledge is essential to monitor patient safety and quality of care. Otherwise we wait

until a patient is seriously injured and someone finally comes to the Medical Board.

As an example of this type of issue, the Board received notice in early 1996 of a hospital's action to suspend a physician for 10 days. However, the hospital refused to give any reason for the suspension, citing the confidentiality of Peer Review. The Board was told "it was nothing of consequence". This left the Board with no way to assure the protection of Maine citizens from a physician whose behavior was so egregious as to have his privilege to work revoked for 10 days. Peer Review is by definition the confidential review and assessment of specific cases of physician practice by a committee of fellow physicians, followed by a confidential and frank discussion between colleagues with the intent of accomplishing appropriate improvement in behaviors or practice techniques. Peer Review does not discipline or sanction. Action against a physician for serious shortcomings comes, according to organization by-laws, through the Medical Staff office. The Board only needs to know the name of the physician, the nature of the problem, and the time period in which it occurred, in sufficient detail to enable independent investigation.

Finally, medical boards in years past were felt to be an "old boy network" which appeared to "protect their own". One of the common techniques was to say nothing about inability or poor performance if the individual would just leave, and take his problems somewhere else. Today, the Board of Licensure in Medicine takes it's charge very seriously. This reporting requirement has done a great deal to stop the hiding of poor performance. It needs to be as strong as possible to protect the citizens of Maine from poor practitioners coming in; and to protect the integrity of the State of Maine in not allowing poor performers to just hide their problems in another state.

Second, BETTER ACCESS TO HEALTH CARE THROUGH PHYSICIAN EXTENDERS: MRSA 32, § 3270B has provided for the regulation of physicians assistants. After a complete review of the appropriate rules, processes, and practices of the industry, the Board adopted significant changes to it's rules in November 1994. Now with two years experience in administering the statutes through the rules it has become clear that statutory modifications are necessary to reflect industry processes. The Board proposes licensure of PA s, which does not allow the ability to practice until a physician supervisory relationship is duly registered. This "preliminary license" if you will, recognizes the candidate's level of training , skills, and national certification by examination. This gives the Physician Assistant a great deal of help when seeking a supervising physician relationship. The enhanced search process improve rural access to health care, since the physician can recruit a P A knowing he or she will have the right to practice when a physician relationship is registered and approved.

The current statutory requirement makes recruiting of PA's more difficult and puts PA s in an unrecognized status during job changes. The changes merely bring statute and current practice into sync.

Third, ORDERING INDEPENDENT EVALUATION OF PRACTITIONER PHYSICAL AND MENTAL STATUS: MRSA 32, § 3296 gives the Board power to order licensees to obtain mental and physical examinations to verify their fitness to practice medicine. From time to time the Board has ordered such evaluations to assess the capability of licensees who have come to the attention of the Board for questionable practice. These evaluations are a critical part of the Board's evaluation process of determining whether problems do exist and whether they may be remediated through

treatment or whether long term actions must be taken.

One interpretation of the current statute suggests that examinations can only be ordered if the Board first exercises an emergency suspension of the practitioner's license, which is interpreted nationwide as a significant discipline, and which must be reported to the National Practitioner Data Bank. This action records a permanent significant blemish on a physicians credentials, possibly for no good reason. In some cases this may be an unduly harsh action, since the Board is merely seeking evaluation before making a decision regarding remediation or discipline.

This language clarifies the Board's authority to order these exams of any licensee without immediate disciplinary action, protecting Maine citizens as patients at the same time preserving physician due process. This authority is available to most state medical boards and, we believe, consistent with the intent of the Maine statute.

I hope that we have succinctly yet clearly explained why the Board feels each of these changes is necessary to assure the protection of Maine citizens.

I would be happy to entertain any questions you may have.

March 5, 1997

Proposed amendment to LD No. 539

The Board of Licensure in Medicine would like to propose the following amendment to **Sec. 3 24 M.R.S.A. §2506, Provider reports:**

Page 1-on line 28 after "to that action." delete the period after action and insert a comma followed by "**except for materials protected under 32 M.R.S.A. §3296.**"

STATE OF MAINE
BOARD OF OSTEOPATHIC LICENSURE
141 STATE HOUSE STATION
LOCATION: TWO BANGOR STREET
AUGUSTA, MAINE
04333-0141

ANGUS S. KING, JR.
GOVERNOR

LOUIS A. HANSON, D.O.
CHAIRMAN

SUSAN E. STROUT
EXECUTIVE SECRETARY

March 11, 1997

Senator John Jenkins, Co-Chair
Representative Mark Vigue, Co-Chair
Committee of Business & Economic Development
115 State House Station
Augusta, ME 04333-0115

Dear Senator Jenkins and Representative Vigue:

I am the Chairman of the Board of Osteopathic Licensure. I have asked Carmen L. Coulombe, the Assistant Attorney General who represents the Board, to appear on its behalf at the Work Session on LD539. I have asked her to request that the Committee amend this bill to make changes in Section 8 of LD539 applicable to the statutes governing the osteopathic practice of medicine.

I have also asked her to request that this bill be amended to change the renewal period for Physician Assistant's licensed under the osteopathic statute from annual to biennial as is the case for Physician Assistant's supervised by allopathic physicians.

Thank you for your kind attention.

Very Sincerely Yours,

Louis A. Hanson, D.O., Chairman

PHONE: (207) 287 3480

FAX: (207) 287 [illegible]

BILL ANALYSIS

LD: 539 **An Act to Clarify the Laws Regarding the Board of Licensure in Medicine & Ensure That Physician Discipline is Reported to the Appropriate Licensing Board**

TO: **Joint Standing Committee on Business and Economic Development**

FROM: **Carrie C. McFadden, Legislative Analyst**

DATE: **March 6, 1997**

SUMMARY:
This bill amends the Maine Health Security Act to include health maintenance organizations, preferred provider arrangements and similar organizations as entities that must report disciplinary action of a practitioner related to clinical competence or unprofessional conduct. The bill also clarifies statutory language in relation to board rules that recognize separate licensure and physician supervision registration for physician assistants. The bill also clarifies the board's authority to require licensees to submit to mental or physical examination.

TESTIMONY:
Written: Sandra Tuttle, Member, Board of Licensure in Medicine

PROPONENTS

- "Maine Health Security Act requires that health care providers report to the board any incident of physician discipline. The board has interpreted this to include all forms of managed care and the proposed language change will clarify this inclusion and the information to be reported."
- Peer review should not be used as an excuse for not reporting physician discipline.
- ME Osteopathic Association supports the uniform reporting requirements.
- Change will allow board to identify disciplinary incidents lasting less than 30 days (greater than 30 days is reported to national data bank).
- "Preliminary license for physician assistants recognizes the candidate's level of training, skills and national certification by exam, ability to practice would be granted when physician supervision relationship is registered."
- "Brings statute and current practice into sync." (P.A.s)
- "Language clarifies the board's authority to order mental and physical exams of any licensee without immediate disciplinary action, protecting Maine citizens as patients and preserving physician due process. Authority available to most state medical boards."

OPPONENTS

- No testimony.

POTENTIAL ISSUES OR TECHNICAL PROBLEMS:

- Amendment submitted by Board of Licensure in Medicine that assures peer review confidentiality
- Amendment mentioned that would address concerns of MMA, Healthsource and BC/BS. Define "adverse actions", "primary support materials", "all information and records" and "similar organizations". Change reference to "physician" (p.1) to "practitioner" as defined in Title 24, if not changed miss other professionals in medical field.
- Section 5 of the bill that proposes changes to the physician assistant provisions would need to be amended to include: 32 §3270-B, sub-§§1 & 5, also make reference to "certificate" or "registration".

ADDITIONAL INFORMATION NEEDED BY COMMITTEE:

- What are current P.A. requirements - how does bill change this? (see current law attached)

FISCAL IMPACT:

Board will incur minor additional costs to investigate complaints. These costs can be absorbed with existing resources of the board.

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SUMMARY OF PROPOSED AMENDMENTS TO L.D. 539

Proposed Amendment	Impact on L. D. 539
Sec. 1. Amends section 9057 of Title 5 to apply the procedures for handling confidential information in administrative hearings to information provided to the boards pursuant to Title 24, section 2506.	New Section
Sec. 2. Changes the subsection designation for "health care practitioner" in §2502 to allow for addition of definition of "Carrier"	New section
Sec. 3. Definition of "Carrier"	Deleted definition of "Health maintenance organization". See Sec. 1. of L.D.
Sec. 4. Definition of "Managed care plan"	Deleted definition of "Preferred provider organization". See Sec. 2. of L.D.
Sec. 5. Clarifies that reports must be made to the boards if the practitioner resigns while under investigation or to avoid investigation "for reasons related to clinical competence or unprofessional conduct".	See Sec. 3. of L.D.
Clarifies "pertinent information" and what additional information must be released to the boards "upon request". boards if the practitioner resigns while under investigation or to avoid investigation "for reasons related to clinical competence or unprofessional conduct".	Limits the reports related to resignation while under investigation or to avoid investigation to situations involving clinical incompetence or unprofessional conduct. Replaces the term "all information and records relating to that action" with a clarification of what is pertinent information that must be provided without request and what information must be provided upon request.
Adds that "carriers providing managed care	Replaces the term "health maintenance

plans" are subject to the reporting requirements of section 2506.	organization, preferred provider organizations and similar organizations" with the term "carriers providing managed care plans"
Sec. 6. Expands the immunities of section 2511 to "any other entity required to report" under section 2506.	New section.
Sec. 7. Provides that the licenses of physician assistants under the Board of Osteopathic Licensure must be renewed biennially instead of annually. This is consistent with the renewal cycle for physician assistants licensed under the Board of Licensure in Medicine.	New section.
Sec. 8. Clarifies that the exemption from discovery in Section 2599 of Title 32 (Osteopathic Practice Act) does not apply to materials and information reported to the board under Section 2506 of Title 24.	New section; applies the same language proposed in Sec. 8 to the Board of Osteopathic Licensure that Sec. 8 applied to the Board of Licensure in Medicine.
Sec. 9. Same as Sec. 4 of L.D. 539	No impact.
Sec.10. Same as Sec. 5 of L.D. 539.	No impact.
Sec. 11. Same as Sec. 6 of L.D. 539.	No impact.
Sec. 12. Same as Sec. 11 of L. D. 539.	No impact.
Sec. 13. Deletes the term "primary source materials utilized in the proceedings" with "materials and information".	Amends sec. 8 of L.D. 539.

PROPOSED AMENDMENTS TO L.D. 539

Sec. 9. 32 MRSA § 2594-B, sub-§ 1, as amended by P.L. 1993, c. 600, § A-185, is further amended to read:

§ 2594-B. Licenses of qualification; physician's statement

1. **Licenses required.** A physician assistant may not practice under the supervision of an osteopathic physician until the physician assistant has applied for and obtained a license issued by the Board of Osteopathic Licensure, which must be reviewed ~~annually~~ biennially.

Sec. 10. 32 MRSA § 2599, as amended by P.L. 1993, c. 600, § A-192, is further amended by adding at the end a new paragraph to read:

The exemptions from discovery under this section do not apply to the identification of an affected practitioner or the primary source materials utilized in the proceedings, which must be reported to the board pursuant to Title 24, section 2506.

SUMMARY

This bill amends the Maine Revised Statutes, Title 24, chapter 21, the Maine Health Security Act, to include health maintenance organizations, preferred provider arrangements and similar organizations as entities that must report practitioner discipline related to clinical competence or unprofessional conduct.

This bill amends Title 32, chapter 36, to change the licensure of physician assistants from annual to biennial.

This bill amends both chapter 36 and 48 of Title 32 to clarify that the exemption from discovery found in Sections 2599 and 3296 does not apply to information that must be reported to the boards pursuant to Title 24, Section 2506.

This bill also amends Title 32, chapter 48, the laws regarding the Board of Licensure in Medicine, to clarify that physician assistants are licensed to practice and are registered with the board, under a supervisory physician. The bill also clarifies the board's authority to require licensees to submit to mental or physical examination.

PROPOSED AMENDMENT TO L.D. 539

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 5 MRSA §9057, sub-§6, as enacted by PL 1989, c. 175, §1, is amended as follows:

6. Confidential information. Information may be disclosed which is confidential pursuant to Title 22, chapters 958-A and 1071 and sections 7703 and 1828; and Title 34-A, except for information, the disclosure of which is absolutely prohibited under Title 34-A, section 3003. Disclosure may be only for the determination of issues involving unemployment compensation proceedings relating to a state employee, state agency personnel actions and professional or occupational board licensure, certification or registration. The following definition and limitations also apply to information provided to the Board of Licensure in Medicine and the Board of Osteopathic Licensure pursuant to Title 24, section 2506.

A. For the purposes of this subsection, "hearing officer" means presiding officer, judge, board chairman, arbitrator or any other person deemed responsible for conducting a proceeding or hearing subject to this subsection. In the case of the Civil Service Appeals Board, the presiding officer shall be the entire board. "Employees of the agency" means employees of a state agency or department or members, agents or employees of a board who are directly related to and whose official duties involve the matter at issue.

B. The confidential information disclosed pursuant to this subsection is subject to the following limitations:

(1) The hearing officer determines that introduction of the confidential information is necessary for the determination of an issue before the hearing officer;

(2) During the introduction of confidential information, the proceeding is open only to the hearing officer, employees of the agency, parties, parties' representatives, counsel of record and the witness testifying regarding the information, and access to the information is limited to these people. Disclosure is limited to information directly related to the matter at issue;

(3) Witnesses shall be sequestered during the introduction of confidential information, except when offering testimony at the proceeding;

(4) The names or identities of reporters of confidential information or of other persons shall not be disclosed, except when disclosure is deemed necessary and relevant by the hearing officer; and
(5) After hearing, the confidential information is sealed within the record and shall not be further disclosed other than for purposes of appellate review, except upon order of court ~~to~~ to the extent permitted by law.

Sec. 2. 24 MRSA §2502, sub-§1-A, as enacted by PL 1985, c. 804, §3, is amended as follows:

~~1-A~~ **1-B. Health care practitioner.** "Health care practitioner" means physicians and all others certified, registered or licensed in the healing arts, including, but not limited to, nurses, podiatrists, optometrists, chiropractors, physical therapists, dentists, psychologists and physicians' assistants.

Sec. 3. 24 MRSA §2502, sub-§1-A. is enacted to read:

1-A. Carrier. "Carrier" means an organization as defined by Title 24-A, chapter 56-A.

Sec. 4. 24 MRSA §2502, sub-§2- A. is enacted to read:

2-A. Managed Care Plan. "Managed care plan" means a plan as defined by Title 24-A, chapter 56-A.

Sec. 5. 24 MRSA §2506, as amended by PL 1989, c. 462, §1, is further amended to read:

§2506. Provider and Carrier reports.

A health care provider shall, within 60 days, report in writing to the disciplined practitioner's board or authority the name of any licensed, certified or registered employee or person privileged by the provider whose employment or privileges have been revoked, suspended, limited ~~or,~~ terminated~~,~~ or who resigned while under investigation or to avoid investigation for reasons related to clinical competence or unprofessional conduct, together with pertinent information relating to that action. In addition to the name of the practitioner, pertinent information shall include what adverse action was taken, a description of the event or events giving rise to the adverse actions described above and the dates and locations of those events. Upon request, the following information must be released to the board: medical records relating to the event or events, written statements signed or prepared by any witness or complainant to the event and related correspondence between the practitioner and the provider.

The report ~~shall~~ must include situations in which employment or privileges have been revoked, suspended, limited or otherwise adversely affected by action of the health care practitioner while the health care practitioner was the subject of disciplinary proceedings, and it also ~~shall~~ must include situations where employment or privileges have been revoked, suspended, limited or otherwise adversely affected by act of the health care practitioner in return for the health care provider terminating such proceeding. Any reversal, modification or change of action reported pursuant to this section ~~shall~~ must be reported immediately to the practitioner's board or authority, together with a brief statement of the reasons for that reversal, modification or change. The failure of any such health care provider to report as required is a civil violation for which a fine of not more than $1,000 may be adjudged.

Carriers providing managed care plans are subject to the reporting requirements of this section, when they take adverse actions against a practitioner's credentials or employment for reasons related to clinical competence or unprofessional conduct that could adversely affect the health or welfare of the patient.

Sec. 6. 24 MRSA §2511, introductory paragraph, as amended by PL 1993, c. 600, §A-19, is amended to read:

§2511. Immunity.

Any person acting without malice, physician, podiatrist, health care provider, professional society, ~~or~~ member of a professional competence committee, professional review committee, ~~or~~ any board or appropriate authority or any other entity required to report under this chapter is immune from civil liability:

Sec. 7. 32 MRSA §2594-B, sub-§1, as amended by PL 1993, c. 600, §A-185, is further amended to read:

§2594-B. Licenses of qualification; physician's statement

1. **Licenses required.** A physician assistant may not practice under the supervision of an osteopathic physician until the physician assistant has applied for and obtained a license issued by the Board of Osteopathic Licensure, which must be reviewed ~~annually~~ biennially.

Sec. 8. 32 MRSA §2599, as amended by PL 1993, c. 600, §A-192, is further amended by adding at the end a new paragraph to read:

Provision of information protected by this section to the board pursuant to Title 24, section 2506, does not waive or otherwise affect the confidentiality of the records or the exemption from discovery provided by this section for any other purpose.

Sec. 9. 32 MRSA §3270-B, as amended by PL 1993, c. 600, Pt. A, §206, is further amended by repealing the headnote and replacing it with the following:

§3270-B. License and regulation

Sec. 10. 32 MRSA §3270-B, first ¶, as amended by PL 1993, c. 600, Pt. A, §206, is further amended to read:

A physician assistant is not permitted to practice until the physician assistant has applied for and obtained a ~~certificate of qualification~~ license issued by the Board of Licensure in Medicine, which must be renewed biennially, and a certificate of registration, ~~which must be renewed biannually~~. All applications for certificate of ~~qualification~~ registration must be accompanied by an application by the proposed supervisory physician, ~~which application~~ that must contain a statement that that physician is responsible for all medical activities of the physician assistant. The Board of Licensure in Medicine is authorized to adopt rules regarding the training and ~~certification~~ licensure of physician assistants and the agency relationship between the physician assistant and the supervising physician. Those rules may pertain, but are not limited, to the following matters:

Sec. 11. 32 MRSA §3270-B, sub-§11, as amended by PL 1993, c. 600, Pt. A, §206, is further amended to read:

11. Fees for biennial license renewal. Fees for the biennial ~~registration~~ license renewal of physician assistants in an amount not to exceed $100.

Sec. 12. 32 MRSA §3286, 2nd ¶, as amended by PL 1993, c. 600, Pt. A, §219, is further amended to read:

For the purposes of this ~~section~~ chapter, by practicing or by making and filing a biennial license to practice medicine in this State, every physician licensed under this chapter who accepts the privilege to practice medicine in this State is deemed to have given consent to a mental or physical examination when directed in writing by the board and to have waived all objections to the admissibility of the examining physicians' testimony or examination reports on the grounds that the testimony or reports constitute a privileged communication.

Sec. 13. 32 MRSA §3296, as amended by PL 1993, c. 600, Pt. A, §223, is further amended by adding at the end a new paragraph to read:

Provision of information protected by this section to the board pursuant to Title 24, section 2506, does not waive or otherwise affect the confidentiality of the records or the exemption from discovery provided by this section for any other purpose.

SUMMARY

Section 1 of this bill amends Section 9057 (6) of Title 5 to apply the procedures for handling confidential information in administrative hearings to information provided to the boards pursuant to Title 24, Section 2506.

Sections 2-6 of ~~T~~this bill amends the Maine Revised Statutes, Title 24, chapter 21, the Maine Health Security Act, to include health maintenance organizations, preferred provider arrangements and similar organizations as entities that must report practitioner discipline related to clinical competence or unprofessional conduct and to apply the immunities provided by this chapter to these organizations. This bill further clarifies when a report pursuant to this chapter must be made to the Board of Licensure in Medicine and the Board of Osteopathic Licensure and what information related to the report must be provided to the boards.

Section 7 of this bill amends Title 32, chapter 36, to change the licensure of the physician assistants under the supervision of the Osteopathic Board from annual to biennial.

Sections 8 and 13 of this bill amend both chapter 36 and 48 of Title 32 to clarify that the exemption from discovery found in Sections 2599 and 3296 does not apply to information that must be reported to the boards pursuant to Title 24, Section 2506. This amendment applies only to the Board of Licensure in Medicine and the Board of Osteopathic Licensure and the materials protected by §2599 and §3296 of Title 32 remain confidential for all other purposes.

Sections 9-12 of ~~T~~this bill also amends Title 32, chapter 48, the law regarding the Board of Licensure in Medicine, to clarify that physician assistants are licensed to practice and are registered with the board, under a supervisory physician. The bill also clarifies the board's authority to require licensees to submit to mental or physical examination.

Current Law Regulating P.A.s

32 § 3270-B. Certificate of qualification and regulation

A physician assistant is not permitted to practice until the physician assistant has applied for and obtained a certificate of qualification issued by the Board of Licensure in Medicine and a certificate of registration, which must be renewed biannually. All applications for certificate of qualification must be accompanied by an application by the proposed supervisory physician, which application must contain a statement that that physician is responsible for all medical activities of the physician assistant. The Board of Licensure in Medicine is authorized to adopt rules regarding the training and certification of physician assistants and the agency relationship between the physician assistant and the supervising physician. Those rules may pertain, but are not limited, to the following matters:

1. Application information. The information to be contained in the application for a certificate of qualification;

2. Application information required of proposed supervisory physician. The information that is required on the application filed by the proposed supervisory physician;

3. Supervising physician's requirements. The training and educational requirements, scope of permissible clinical medical procedures, the manner and methods by which the supervising physician shall supervise the physician assistant's medical services;

4. Methods and conditions. The methods and conditions under which the physician assistant may perform medical services;

5. Temporary eligibility. The issuance of temporary physician assistant certification and equivalency training eligibility for registration of physician assistant trainees;

6. Advisory committee appointment. Appointment of an advisory committee for continuing review of physician assistant program and rules;

7. Continuing educational requirements. Continuing educational requirements as a precondition to continued licensure or licensure renewal;

8. Fees for original application. Fees for the original physician assistant application, which may not exceed $100;

9. Initial application of supervising physician. Fee for the initial application of the supervising physician, which may not exceed $100;

10. Fee for transfer of license. Fee for transfer of registration by a physician assistant from one supervising physician to another, which may not exceed $50; and

11. Fees for biennial license renewal. Fees for the biennial registration renewal of physician assistants in an amount not to exceed $100.

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32 § 3296. Records of proceedings of medical staff review committees confidential

All proceedings and records of proceedings concerning medical staff reviews, hospital reviews and other reviews of medical care conducted by committees of physicians and other health care personnel on behalf of hospitals located within the State or on behalf of individual physicians, when the reviews are required by state or federal law, rule or as a condition of accreditation by the Joint Commission on Accreditation of Hospitals or the American Osteopathic Association Committee on Hospital Accreditation or are conducted under the auspices of the state or county professional society to which the physician belongs, are confidential and are exempt from discovery.

L.D. 539

DATE: (Filing No. H-)

BUSINESS AND ECONOMIC DEVELOPMENT

Reproduced and distributed under the direction of the Clerk of the House.

STATE OF MAINE
HOUSE OF REPRESENTATIVES
118TH LEGISLATURE
FIRST SPECIAL SESSION

COMMITTEE AMENDMENT " " to H.P. 394, L.D. 539, Bill, "An Act to Clarify the Laws Regarding the Board of Licensure in Medicine and Ensure That Physician Discipline Is Reported to the Appropriate Licensing Board"

Amend the bill by striking out everything after the enacting clause and before the summary and inserting in its place the following:

'**Sec. 1. 5 MRSA §9057, sub-§6,** as amended by PL 1989, c. 175, §1, is further amended to read:

6. Confidential information. Information may be disclosed ~~which~~ that is confidential pursuant to Title 22, chapters 958-A and 1071 and sections 7703 and 1828; Title 24, section 2506; and Title 34-A, except for information, the disclosure of which is absolutely prohibited under Title 34-A, section 3003. Disclosure may be only for the determination of issues involving unemployment compensation proceedings relating to a state employee, state agency personnel actions and professional or occupational board licensure, certification or registration.

A. For the purpose of this subsection, "hearing officer" means presiding officer, judge, board chairman, arbitrator or any other person ~~deemed~~ considered responsible for conducting a proceeding or hearing subject to this subsection. In the case of the Civil Service Appeals Board, the presiding officer ~~shall--be~~ is the entire board. "Employees of the agency" means employees of a state agency or department or members, agents or employees of a board who are directly related to and whose official duties involve the matter at issue.

B. The confidential information disclosed pursuant to this subsection is subject to the following limitations:

(1) The hearing officer determines that introduction of the confidential information is necessary for the determination of an issue before the hearing officer;

(2) During the introduction of confidential information, the proceeding is open only to the hearing officer, employees of the agency, parties, parties' representatives, counsel of record and the witness testifying regarding the information, and access to the information is limited to these people. Disclosure is limited to information directly related to the matter at issue;

(3) Witnesses ~~shall--be~~ are sequestered during the introduction of confidential information, except when offering testimony at the proceeding;

(4) The names or identities of reporters of confidential information or of other persons ~~shall~~ may not be disclosed, except when disclosure is ~~deemed~~ determined necessary and relevant by the hearing officer; and

(5) After hearing, the confidential information is sealed within the record and ~~shall~~ may not be further disclosed, except upon order of court.

Sec. 2. 24 MRSA §2502, sub-§§1-B and 2-A are enacted to read:

1-B. Carrier. "Carrier" has the same meaning as in Title 24-A, chapter 56-A.

2-A. Managed care plan. "Managed care plan" has the same meaning as in Title 24-A, chapter 56-A.

Sec. 3. 24 MRSA §2506, as amended by PL 1989, c. 462, §1, is further amended to read:

§2506. Provider and carrier reports

A health care provider shall, within 60 days, report in writing to the disciplined practitioner's board or authority the name of any licensed, certified or registered employee or person privileged by the provider whose employment or privileges have been revoked, suspended, limited or terminated or who resigned

while under investigation or to avoid investigation for reasons related to clinical competence or unprofessional conduct, together with pertinent information relating to that action. Pertinent information includes a description of the adverse action, the date, the location and a description of the event or events giving rise to the adverse action. Upon request, the following information must be released to the board or authority: medical records relating to the event or events; written statements signed or prepared by any witness or complainant to the event; and related correspondence between the practitioner and the provider. The report ~~shall~~ must include situations in which employment or privileges have been revoked, suspended, limited or otherwise adversely affected by action of the health care practitioner while the health care practitioner was the subject of disciplinary proceedings, and it also ~~shall~~ must include situations where employment or privileges have been revoked, suspended, limited or otherwise adversely affected by act of the health care practitioner in return for the health care provider terminating such proceeding. Any reversal, modification or change of action reported pursuant to this section ~~shall~~ must be reported immediately to the practitioner's board or authority, together with a brief statement of the reasons for that reversal, modification or change. The failure of any ~~such~~ health care provider to report as required is a civil violation for which a fine of not more than $1,000 may be adjudged.

Carriers providing managed care plans are subject to the reporting requirements of this section when they take adverse actions against a practitioner's credentials or employment for reasons related to clinical competence or unprofessional conduct that may adversely affect the health or welfare of the patient.

Sec. 4. 24 MRSA §2511, as amended by PL 1993, c. 600, Pt. A, §19, is further amended to read:

Any person acting without malice, any physician, podiatrist, health care provider, or professional society ~~or~~, any member of a professional competence committee, or professional review committee ~~or~~, any board or appropriate authority ~~is~~ and any entity required to report under this chapter are immune from civil liability:

Sec. 5. 32 MRSA §2954-B, sub-§1, as amended by PL 1993, c. 600, Pt. A, §185, is further amended to read:

1. License required. A physician assistant may not practice under the supervision of an osteopathic physician until the physician assistant has applied for and obtained a license issued by the Board of Osteopathic Licensure, which must be renewed ~~annually~~ biennially.

Sec. 6. 32 MRSA §2599, as amended by PL 1993, c. 600, Pt. A, §192, is further amended by adding at the end a new paragraph to read:

Provision of information protected by this section to the board pursuant to Title 24, section 2506 does not waive or otherwise affect the confidentiality of the records or the exemption from discovery provided by this section for any other purpose.

Sec. 7. 32 MRSA §3270-B, as amended by PL 1993, c. 600, Pt. A, §206, is further amended by repealing the headnote and replacing it with the following:

§3270-B. License and regulation

Sec. 8. 32 MRSA §3270-B, first ¶, as amended by PL 1993, c. 600, Pt. A, §206, is further amended to read:

A physician assistant is not permitted to practice until the physician assistant has applied for and obtained a ~~certificate of qualification~~ license issued by the Board of Licensure in Medicine, which must be renewed biennially, and a certificate of registration, ~~which must be renewed biannually~~. All applications for certificate of ~~qualification~~ registration must be accompanied by an application by the proposed supervisory physician, ~~which application~~ that must contain a statement that that physician is responsible for all medical activities of the physician assistant. The Board of Licensure in Medicine is authorized to adopt rules regarding the training and ~~certification~~ licensure of physician assistants and the agency relationship between the physician assistant and the supervising physician. Those rules may pertain, but are not limited, to the following matters:

Sec. 9. 32 MRSA §3270-B, sub-§1, as enacted by PL 1975, c. 680, §1, is amended to read:

1. Application information. The information to be contained in the application for a certificate of ~~qualification~~ registration;

Sec. 10. 32 MRSA §3270-B, sub-§11, as amended by PL 1993, c. 600, Pt. A, §206, is further amended to read:

11. Fees for biennial license renewal. Fees for the biennial ~~registration~~ license renewal of physician assistants in an amount not to exceed $100.

Sec. 11. 32 MRSA §3286, 2nd ¶, as amended by PL 1993, c. 600, Pt. A, §219, is further amended to read:

For the purpose of this ~~section~~ chapter, by practicing or by making and filing a biennial license to practice medicine in this State, every physician licensed under this chapter who accepts the privilege to practice medicine in this State is deemed to have given consent to a mental or physical examination when directed in writing by the board and to have waived all objections to the admissibility of the examining physicians' testimony or examination reports on the grounds that the testimony or reports constitute a privileged communication.

Sec. 12. 32 MRSA §3296, as amended by PL 1993, c. 600, Pt. A, §223, is further amended by adding at the end a new paragraph to read:

Provision of information protected by this section to the board pursuant to Title 24, section 2506 does not waive or otherwise affect the confidentiality of the records or the exemption from discovery provided by this section for any other purpose.'

Further amend the bill by inserting at the end before the summary the following:

'FISCAL NOTE

The Board of Licensure in Medicine and the Board of Osteopathic Licensure, affiliated with the Department of Professional and Financial Regulation, will incur some minor additional costs to investigate complaints. These costs can be absorbed within the boards' existing budgeted resources.

Changing the licensure terms for physician assistants from annual to biennial will result in insignificant reductions of dedicated revenue to the Board of Osteopathic Licensure from license fees.'

SUMMARY

This amendment strikes the bill and enacts new language to clarify concerns on various sections. This amendment amends the Maine Revised Statutes, Title 5, section 9057, subsection 6 to apply the procedures for handling confidential information in administrative hearings to information provided to the boards of medicine and osteopathic licensure pursuant to Title 24, section 2506.

COMMITTEE AMENDMENT " " to H.P. 394, L.D. 539

This amendment amends the Maine Health Security Act to include health maintenance organizations, preferred provider arrangements and similar organizations as entities that must report practitioner discipline related to clinical competence or unprofessional conduct and to apply the immunities provided by the Maine Health Security Act to these organizations. This amendment clarifies when a report pursuant to the Maine Health Security Act must be made to the Board of Licensure in Medicine and the Board of Osteopathic Licensure and what information related to the report must be provided to the boards.

This amendment changes the licensure of the physician assistants under the supervision of the Board of Osteopathic Licensure from annual to biennial.

This amendment clarifies that the exemption from discovery does not apply to information that must be reported to the boards pursuant to Title 24, section 2506. This amendment applies only to the Board of Licensure in Medicine and the Board of Osteopathic Licensure and the materials protected by Title 32, section 2599 and section 3296 remain confidential for all other purposes.

This amendment clarifies that physician assistants are licensed to practice and are registered with the Board of Licensure in Medicine under a supervisory physician. This amendment also clarifies the board's authority to require licensees to submit to mental or physical examination.

This amendment also adds a fiscal note to the bill.

Committee: BEC
LA: CCM
LR # and item number: 053602
New Title?: N
Add Emergency?: N
Date: 3/28/97
File Name: G:\OPLAGEA\COMMTTEE\BEC\AMENDMEN\053602.DOC

COMMITTEE AMENDMENT "A" TO LD 539, An Act to Clarify the Laws Regarding the Board of Licensure in Medicine and Ensure That Physician Discipline is Reported to the Appropriate Licensing Board.

Amend the bill by striking out everything after the enacting clause and before the summary and inserting in its place the following:

Sec. 1. 5 MRSA §9057, sub-§6, as enacted by PL 1989, c. 175, §1, is amended as follows:

6. Confidential information. Information may be disclosed which is confidential pursuant to Title 22, chapters 958-A and 1071 and sections 7703 and 1828; Title 24 § 2506; and Title 34-A, except for information, the disclosure of which is absolutely prohibited under Title 34-A, section 3003. Disclosure may be only for the determination of issues involving unemployment compensation proceedings relating to a state employee, state agency personnel actions and professional or occupational board licensure, certification or registration.

Sec. 2. 24 MRSA §2502, sub-§1-A, as enacted by PL 1985, c. 804, §3, is repealed.

Sec. 3. 24 MRSA §2502, sub-§1-B is enacted to read:

1-B. Carrier. "Carrier" has the same meaning as defined in Title 24-A, chapter 56-A.

Sec. 4. 24 MRSA §2502, sub-§1-C is enacted to read:

1-C. Health care practitioner. "Health care practitioner" means physicians and all other certified, registered or licensed in the healing arts, including, but not limited to, nurses, podiatrists, optometrists, chiropractors, physical therapists, dentists, psychologists and physicians' assistants.

Sec. 5. 24 MRSA §2502, sub-§2-A is enacted to read:

2-A. Managed care plan. "Managed care plan" has the same meaning as defined in Title 24-A, chapter 56-A.

Sec. 6. 24 MRSA §2506, as amended by PL 1989, c. 462, §1, is further amended to read:

§2506. Provider and Carrier reports

A health care provider shall, within 60 days, report in writing to the practitioner's board or authority the name of any licensed, certified or registered employee or person privileged by the provider whose employment or privileges have been revoked, suspended, limited ~~or~~, terminated~~,~~ or who resigned while under investigation or to avoid investigation for reasons related to clinical competence or unprofessional conduct, together with pertinent information relating to that action. Pertinent information includes a description of the adverse action that resulted, the date and location of the event or events and a description of the event or events giving rise to the adverse action described above. Upon request, the following information must be released to the board: medical records relating to the event or events, written statements signed or prepared by any witness or complainant to the event and related correspondence between the practitioner and the provider. The report ~~shall~~ must include situations in which employment or privileges have been revoked, suspended, limited or otherwise adversely affected by action of the health care practitioner while the health care practitioner was the subject of disciplinary proceedings, and it also ~~shall~~ must include situations where employment or privileges have been revoked, suspended, limited or otherwise adversely affected by act of the health care practitioner in return for the health care provider terminating such proceeding. Any reversal, modification or change of action reported pursuant to this section ~~shall~~ must be reported immediately to the practitioner's board or authority, together with a brief statement of the reasons for that reversal, modification or change. The failure of any such health care provider to report as required is a civil violation for which a fine of not more than $1,000 may be adjudged.

Carriers providing managed care plans are subject to the reporting requirements of this section, when they take adverse actions against a practitioner's credentials or employment for reasons related to clinical competence or unprofessional conduct that could adversely affect the health or welfare of the patient.

Sec. 7. 24 MRSA §2511, introductory paragraph, as amended by PL 1993, c. 600, §A-19, is amended to read:

Any person acting without malice, physician, podiatrist, health care provider, professional society, ~~or~~ member of a professional competence committee, professional review committee, ~~or~~ any board or appropriate authority or any ~~carrier~~ entity required to report under this chapter is immune from civil liability:

Sec. 8. 32 MRSA §2594-B, sub-§1, as amended by PL 1993, c. 600, §A-185, is further amended to read:

1. Licenses required. A physician assistant may not practice under the supervision of an osteopathic physician until the physician assistant has applied for and obtained a license issued by the Board of Osteopathic Licensure, which must be reviewed ~~annually~~ biennially.

Sec. 9. 32 MRSA §2599, as amended by PL 1993, c. 600, §A-192, is further amended by adding at the end a new paragraph to read:

Provision of information protected by this section to the board pursuant to Title 24, section 2506, does not waive or otherwise affect the confidentiality of the records or the exemption from discovery provided by this section for any other purpose.

Sec. 10. 32 MRSA §3270-B, as amended by PL 1993, c. 600, Pt. A, §206, is further amended by repealing the headnote and replacing it with the following:

§3270-B. License and regulation

Sec. 11. 32 MRSA §3270-B, first ¶, as amended by PL 1993, c. 600, Pt. A, §206, is further amended to read:

A physician assistant is not permitted to practice until the physician assistant has applied for and obtained a ~~certificate of qualification~~ license issued by the Board of Licensure in Medicine, which must be renewed biennially, and a certificate of registration~~, which must be renewed biannually~~. All applications for certificate of ~~qualification~~ registration must be accompanied by an application by the proposed supervisory physician~~, which application~~ that must contain a statement that that physician is responsible for all medical activities of the physician assistant. The Board of Licensure in Medicine is authorized to adopt rules regarding the training and ~~certification~~ licensure of physician assistants and the agency relationship between the physician assistant and the supervising physician. Those rules may pertain, but are not limited, to the following matters:

Sec. 12. 32 MRSA §3270-B, sub-§1 is amended to read:

1. Application information. The information to be contained in the application for a certificate of ~~qualification~~registration;

Sec. 13. 32 MRSA §3270-B, sub-§11, as amended by PL 1993, c. 600, Pt. A, §206, is further amended to read:

11. Fees for biennial license renewal. Fees for the biennial ~~registration~~ license renewal of physician assistants in an amount not to exceed $100.

Sec. 14. 32 MRSA §3286, 2nd ¶, as amended by PL 1993, c. 600, Pt. A, §219, is further amended to read:

For the purpose of this ~~section~~ chapter, by practicing or by making and filing a biennial license to practice medicine in this State, every physician licensed under this chapter who accepts the privilege to practice medicine in this State is deemed to have given consent to a mental or physical examination when directed in writing by the board and to have waived all objections to the admissibility of the examining physicians' testimony or examination reports on the grounds that the testimony or reports constitute a privileged communication.

Sec. 15. 32 MRSA §3296, as amended by PL 1993, c. 600, Pt. A, §223, is further amended by adding at the end a new paragraph to read:

Provision of information protected by this section to the board pursuant to Title 24, section 2506, does not waive or otherwise affect the confidentiality of the records or the exemption from discovery provided by this section for any other purpose.

SUMMARY

This amendments strikes the bill and enacts new language to clarify concerns on various sections. Section 1 of this amendment amends 5 MRSA § 9057, sub-§6 to apply the procedures for handling confidential information in administrative hearings to information provided to the boards of medicine and osteopathic licensure pursuant to 24 MRSA § 2506.

Sections 2-7 of this amendment amend the Maine Health Security Act to include health maintenance organizations, preferred provider arrangements and similar organizations as entities that must report practitioner discipline related to clinical competence or unprofessional conduct and to apply the immunities provided by the act to these organizations. This amendment clarifies when a report pursuant to the act must be made to the Board of Licensure in Medicine and the Board of Osteopathic Licensure and what information related to the report must be provided to the boards.

Section 8 of this amendment changes the licensure of the physician assistants under the supervision of the Osteopathic Board from annual to biennial.

Sections 9 and 15 of this amendment clarify that the exemption from discovery does not apply to information that must be reported to the boards pursuant to 24 MRSA § 2506. This amendment applies only to the Board of Licensure in Medicine and the Board of Osteopathic Licensure and the materials protected by § 2599 and § 3296 of Title 32 remain confidential for all other purposes.

Sections 10-14 of this amendment clarify that physician assistants are licensed to practice and are registered with the Board of Licensure in Medicine, under a supervisory physician. This amendment also clarifies the board's authority to require licensees to submit to mental or physical examination.

JOHN D. WAKEFIELD
Director

JAMES A. CLAIR
Deputy Director

Date: 02/26/97 ORIGINAL
Hearing Date: 03/06/97
Committee: Business and Economic Development

Maine State Legislature
OFFICE OF FISCAL AND PROGRAM REVIEW
Augusta, Maine 04333

TO: Senate Chair - Sen. J. Jenkins

House Chair - Rep. M. Vigue

Sponsor - Rep. Vigue of Winslow

FROM: Grant T. Pennoyer, Principal Analyst

SUBJECT: FISCAL NOTE INFORMATION FOR **LD 539**

An Act to Clarify the Laws Regarding the Board of Licensure in Medicine and Ensure That Physician Discipline Is Reported to the Appropriate Licensing Board

The estimated increase (decrease) of Appropriations and Allocations:

Line Item Summary	**1997-98**	**1998-99**
TOTAL		

Fund Summary	**1997-98**	**1998-99**

The estimated increase (decrease) of Revenues:

	1997-98	**1998-99**

Comments:

The Board of Licensure in Medicine, affiliated with the Department of Professional and Financial Regulation, will incur some minor additional costs to investigate complaints. These costs can be absorbed within the board's existing budgeted resources.

STATE OF MAINE

118th Legislature

OFFICE OF FISCAL AND PROGRAM REVIEW

05/12/97 RFP

H.P. 394 - L.D. 539

CURRENT TITLE: An Act to Clarify the Laws Regarding the Board of Licensure in Medicine and Ensure That Physician Discipline Is Reported to the Appropriate Licensing Board

Committee: Business and Economic Development
Fiscal Impact of LD: Minor Costs

This Fiscal Note is for the bill as Engrossed with the Following Amendments:

C "A" (H-359) **Fiscal Impact**

FISCAL NOTE

The Board of Licensure in Medicine and the Board of Osteopathic Licensure, affiliated with the Department of Professional and Financial Regulation, will incur some minor additional costs to investigate complaints. These costs can be absorbed within the boards' existing budgeted resources.

Changing the licensure terms for physician assistants from annual to biennial will result in insignificant reductions of dedicated revenue to the Board of Osteopathic Licensure from license fees.

COMMITTEE VOTING TALLY SHEET

LD # ~~or Confirmation:~~ 539

Committee: BUSINESS & ECONOMIC DEVELOPMENT

Date: March 24, 1997

Motion: OTPA

Motion by: Shannon

Seconded by: MacDougall

	Those Voting in Favor of the Motion	Recommendation of those opposed to the Motion					Absent	Abstain
		ONTP	OTP	OTP-AM	New Draft	Re-Refer		
Senators								
* 1 Jenkins	✓							
2 MacKinnon	✓							
3 Rand	✓AK						X	
Representatives								
* 1 Vigue	✓							
2 Bodwell	✓WKB						X	
3 Murphy	✓TWM						X	
4 Farnsworth	✓ARF						X	
5 Cameron	✓							
6 Sirois	✓							
7 Shannon	✓							
8 MacDougall	✓							
9 Mack	~~OTP~~							
10 Wright	✓TJW						X	
TOTALS	13						Ø	

COMMITTEE VOTING TALLY SHEET

LD # ~~or Confirmation:~~ 539

Committee: BUSINESS & ECONOMIC DEVELOPMENT

Date: March 11, 1997

Motion: TABLE

Motion by: Mac Dougall

Seconded by: Farnsworth

	Those Voting in Favor of the Motion	Recommendation of those opposed to the Motion					Absent	Abstain
		ONTP	OTP	OTP-AM	New Draft	Re-Refer		
Senators								
1 Jenkins							✓	
2 MacKinnon	✓							
3 Rand							✓	
Representatives								
1 Vigue	✓							
2 Bodwell	✓							
3 Murphy	✓							
4 Farnsworth	✓							
5 Cameron	✓							
6 Sirois	✓							
7 Shannon	✓							
8 MacDougall	✓							
9 Mack	✓							
10 Wright							✓	
TOTALS	10						3	

HOUSE REPORT

THE COMMITTEE ON BUSINESS AND ECONOMIC DEVELOPMENT

to which was referred the following:

An Act to Clarify the Laws Regarding the Board of Licensure in Medicine and Ensure That Physician Discipline Is Reported to the Appropriate Licensing Board.

H.P. 394 **L.D. 539**

has had the same under consideration, and asks leave to report that the same

OUGHT TO PASS AS AMENDED BY COMMITTEE AMENDMENT " ".

Thom J. Wright of BERWICK

(Signature) REP. WRIGHT For the Committee.

(Type) (Signatures)

Rep. of (Town) and/or Sen. of (County)

HOUSE REPORT

School administrative units shall submit requests for upgrades under this section to the Department of Education before July 1, ~~1996~~ 1999.

See title page for effective date.

CHAPTER 697

S.P. 571 - L.D. 1728

An Act to Promote Professional Competence and Improve Patient Care

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 24 MRSA §2502, sub-§§1-C and 1-D are enacted to read:

1-C. Adverse professional competence review action. "Adverse professional competence review action" means an action based upon professional competence review activity to reduce, restrict, suspend, deny, revoke or fail to grant or renew a physician's:

A. Membership, clinical privileges, clinical practice authority or professional certification in a hospital or other health care entity; or

B. Participation on a health care entity's provider panel.

1-D. Health care entity. "Health care entity" means:

A. An entity that provides or arranges for health care services and that follows a written professional competence review process;

B. An entity that furnishes the services of physicians to another health care entity or to individuals and that follows a written professional competence review process; or

C. A professional society or professional certifying organization when conducting professional competence review activity.

Sec. 2. 24 MRSA §2502, sub-§4, as enacted by PL 1977, c. 492, §3, is repealed and the following enacted in its place:

4. Professional competence committee. "Professional competence committee" means any of the following when engaging in professional competence review activity:

A. A health care entity;

B. An individual or group, such as a medical staff officer, department or committee, to which a health care entity delegates responsibility for professional competence review activity;

C. Entities and persons, including contractors, consultants, attorneys and staff, who assist in performing professional competence review activities; or

D. Joint committees of 2 or more health care entities.

Sec. 3. 24 MRSA §2502, sub-§4-B is enacted to read:

4-B. Professional competence review activity. "Professional competence review activity" means study, evaluation, investigation, recommendation or action, by or on behalf of a health care entity and carried out by a professional competence committee, necessary to:

A. Maintain or improve the quality of care rendered in, through or by the health care entity or by physicians;

B. Reduce morbidity and mortality; or

C. Establish and enforce appropriate standards of professional qualification, competence, conduct or performance.

Sec. 4. 24 MRSA §2502, sub-§§8 and 9 are enacted to read:

8. Professional competence review records. "Professional competence review records" means the minutes, files, notes, records, reports, statements, memoranda, data bases, proceedings, findings and work product prepared at the request of or generated by a professional competence review committee relating to professional competence review activity. Records received or considered by a professional competence committee during professional competence review activity are not "professional competence review records" if the records are individual medical or clinical records or any other record that was created for purposes other than professional competence review activity and is available from a source other than a professional competence committee.

9. Written professional competence review process. "Written professional competence review process" means a process that is reduced to writing and includes:

A. Written criteria adopted by the health care entity that are designed to form the primary basis for granting membership, privileges or participation in or through the health care entity. The health care entity shall furnish or make available

for inspection and photocopying to a requesting physician the written criteria used by the entity; and

B. A mechanism through which an individual physician can:

(1) Be informed in writing of the basis of any adverse professional competence review action;

(2) Participate in a meeting or hearing with representatives of the health care entity at which time the facts upon which an adverse action is based and the basis for the adverse action can be discussed and reconsidered; and

(3) Receive a written explanation of any final adverse professional competence review action.

Sec. 5. 24 MRSA §2506, as amended by PL 1997, c. 271, §3, is further amended to read:

§2506. Provider, entity and carrier reports

A health care provider or health care entity shall, within 60 days, report in writing to the disciplined practitioner's board or authority the name of any licensed, certified or registered employee or person privileged by the provider or entity whose employment or privileges have been revoked, suspended, limited or terminated or who resigned while under investigation or to avoid investigation for reasons related to clinical competence or unprofessional conduct, together with pertinent information relating to that action. Pertinent information includes a description of the adverse action, the date, the location and a description of the event or events giving rise to the adverse action. Upon request, the following information must be released to the board or authority: medical records relating to the event or events; written statements signed or prepared by any witness or complainant to the event; and related correspondence between the practitioner and the provider or entity. The report must include situations in which employment or privileges have been revoked, suspended, limited or otherwise adversely affected by action of the health care practitioner while the health care practitioner was the subject of disciplinary proceedings, and it also must include situations where employment or privileges have been revoked, suspended, limited or otherwise adversely affected by act of the health care practitioner in return for the health care provider or health care entity terminating such proceeding. Any reversal, modification or change of action reported pursuant to this section must be reported immediately to the practitioner's board or authority, together with a brief statement of the reasons for that reversal, modification or change. The failure of any health care provider or health care entity to report as required is a civil violation for which a fine of not more than $1,000 may be adjudged.

Carriers providing managed care plans are subject to the reporting requirements of this section when they take adverse actions against a practitioner's credentials or employment for reasons related to clinical competence or unprofessional conduct that may adversely affect the health or welfare of the patient.

Sec. 6. 24 MRSA §2508, as enacted by PL 1977, c. 492, §3, is amended to read:

§2508. Effect of filing

The filing of a report with the board pursuant to this chapter, investigation by the board or any disposition by the board ~~shall~~ may not, in and of itself, preclude any action by a hospital or other health care facility or health care entity or professional society comprised primarily of physicians to suspend, restrict or revoke the privileges or membership of the physician.

Sec. 7. 24 MRSA §§2510-A and 2510-B are enacted to read:

§2510-A. Confidentiality of professional competence review records

Except as otherwise provided by this chapter, all professional competence review records are privileged and confidential and are not subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity and are not admissible as evidence in any civil, judicial or administrative proceeding. Information contained in professional competence review records is not admissible at trial or deposition in the form of testimony by an individual who participated in the written professional competence review process. Nothing in this section may be read to abrogate the obligations to report and provide information under section 2506, nor the application of Title 32, sections 2599 and 3296.

1. Protection; waiver. This chapter's protection may be invoked by a professional competence committee or by the subject of professional competence review activity in any civil, judicial or administrative proceeding. This section's protection may be waived only by a written waiver executed by an authorized representative of the professional competence committee.

2. Adverse professional competence review action. Subsection 1 does not apply in a proceeding in which a physician contests an adverse professional competence review action against that physician, but

the discovery, use and introduction of professional competence review records in such a proceeding does not constitute a waiver of subsection 1 in any other or subsequent proceedings seeking damages for alleged professional negligence against the physician who is the subject of such professional competence review records.

3. Defense of professional competence committee. Subsection 1 does not apply in a proceeding in which a professional competence committee uses professional competence review records in its own defense, but the discovery, use and introduction of professional competence review records in such a proceeding does not constitute a waiver of subsection 1 in the same or other proceeding seeking damages for alleged professional negligence against the physician who is the subject of such professional competence review records.

4. Waiver regarding individual. Waiver of subsection 1 in a proceeding regarding one physician does not constitute a waiver of subsection 1 as to other physicians.

§2510-B. Release of professional competence review records

Nothing in this section may be read to abrogate the obligations to report and provide information under section 2506.

1. Release to other review bodies, agencies, accrediting bodies. A professional competence committee may furnish professional competence review records or information to other professional review bodies, state or federal government agencies and national accrediting bodies without waiving any privilege against disclosure under section 2510-A.

2. Release to physician. A professional competence committee may furnish professional competence review records to the physician who is the subject of the professional competence review activity and the physician's attorneys, agents and representatives without waiving any privilege against disclosure under section 2510-A.

3. Release of directory information. A professional competence committee may furnish directory information showing membership, clinical privileges, provider panel or other practice status of a physician with the health care entity to anyone without waiving the privilege against disclosure under section 2510-A.

Sec. 8. 24 MRSA §2511, first ¶, as amended by PL 1997, c. 271, §4, is further amended to read:

Any person acting without malice, any physician, podiatrist, health care provider, health care entity or professional society, any member of a professional competence committee or professional review committee, any board or appropriate authority and any entity required to report under this chapter are immune from civil liability:

See title page for effective date.

CHAPTER 698

S.P. 598 - L.D. 1777

An Act to Permit the Creation of Municipal Fire Districts

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 26 MRSA §962, sub-§7, ¶A, as amended by PL 1993, c. 410, Pt. L, §45, is further amended to read:

A. Any officer, board, commission, council, committee or other persons or body acting on behalf of:

(1) Any municipality or any subdivision of a municipality;

(2) Any school, water, sewer, fire or other district;

(3) The Maine Turnpike Authority;

(4) Any board of directors functioning as a regional intermediate education unit pursuant to Title 20-A, section 7730;

(5) Any county or subdivision of a county; or

(6) The Maine State Retirement System; or

Sec. 2. 30-A MRSA c. 164 is enacted to read:

CHAPTER 164

FIRE DISTRICTS

§3531. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. District. "District" or "fire district" means a district created by vote of a group of municipalities for the purpose of providing fire protection.

§3532. Formation; powers

L.D. 1728

DATE: MARCH 18, 1998 (Filing No. S- 543)

JUDICIARY

Reported by:

Reproduced and distributed under the direction of the Secretary of the Senate.

STATE OF MAINE
SENATE
118TH LEGISLATURE
SECOND REGULAR SESSION

COMMITTEE AMENDMENT "A" to S.P. 571, L.D. 1728, Bill, "An Act to Promote Professional Competence and Improve Patient Care"

Amend the bill by striking out everything after the enacting clause and before the summary and inserting in its place the following:

'**Sec. 1. 24 MRSA §2502, sub-§§1-C and 1-D** are enacted to read:

1-C. Adverse professional competence review action. "Adverse professional competence review action" means an action based upon professional competence review activity to reduce, restrict, suspend, deny, revoke or fail to grant or renew a physician's:

A. Membership, clinical privileges, clinical practice authority or professional certification in a hospital or other health care entity; or

B. Participation on a health care entity's provider panel.

1-D. Health care entity. "Health care entity" means:

A. An entity that provides or arranges for health care services and that follows a written professional competence review process;

COMMITTEE AMENDMENT

B. An entity that furnishes the services of physicians to another health care entity or to individuals and that follows a written professional competence review process; or

C. A professional society or professional certifying organization when conducting professional competence review activity.

Sec. 2. 24 MRSA §2502, sub-§4, as enacted by PL 1977, c. 492, §3, is repealed and the following enacted in its place:

4. Professional competence committee. "Professional competence committee" means any of the following when engaging in professional competence review activity:

A. A health care entity;

B. An individual or group, such as a medical staff officer, department or committee, to which a health care entity delegates responsibility for professional competence review activity;

C. Entities and persons, including contractors, consultants, attorneys and staff, who assist in performing professional competence review activities; or

D. Joint committees of 2 or more health care entities.

Sec. 3. 24 MRSA §2502, sub-§4-B is enacted to read:

4-B. Professional competence review activity. "Professional competence review activity" means study, evaluation, investigation, recommendation or action, by or on behalf of a health care entity and carried out by a professional competence committee, necessary to:

A. Maintain or improve the quality of care rendered in, through or by the health care entity or by physicians;

B. Reduce morbidity and mortality; or

C. Establish and enforce appropriate standards of professional qualification, competence, conduct or performance.

Sec. 4. 24 MRSA §2502, sub-§§8 and 9 are enacted to read:

8. Professional competence review records. "Professional competence review records" means the minutes, files, notes, records, reports, statements, memoranda, data bases, proceedings,

findings and work product prepared at the request of or generated by a professional competence review committee relating to professional competence review activity. Records received or considered by a professional competence committee during professional competence review activity are not "professional competence review records" if the records are individual medical or clinical records or any other record that was created for purposes other than professional competence review activity and is available from a source other than a professional competence committee.

9. Written professional competence review process. "Written professional competence review process" means a process that is reduced to writing and includes:

A. Written criteria adopted by the health care entity that are designed to form the primary basis for granting membership, privileges or participation in or through the health care entity. The health care entity shall furnish or make available for inspection and photocopying to a requesting physician the written criteria used by the entity; and

B. A mechanism through which an individual physician can:

(1) Be informed in writing of the basis of any adverse professional competence review action;

(2) Participate in a meeting or hearing with representatives of the health care entity at which time the facts upon which an adverse action is based and the basis for the adverse action can be discussed and reconsidered; and

(3) Receive a written explanation of any final adverse professional competence review action.

Sec. 5. 24 MRSA §2506, as amended by PL 1997, c. 271, §3, is further amended to read:

§2506. Provider, entity and carrier reports

A health care provider or health care entity shall, within 60 days, report in writing to the disciplined practitioner's board or authority the name of any licensed, certified or registered employee or person privileged by the provider or entity whose employment or privileges have been revoked, suspended, limited or terminated or who resigned while under investigation or to avoid investigation for reasons related to clinical competence or unprofessional conduct, together with pertinent information relating to that action. Pertinent information includes a description of the adverse action, the

date, the location and a description of the event or events giving rise to the adverse action. Upon request, the following information must be released to the board or authority: medical records relating to the event or events; written statements signed or prepared by any witness or complainant to the event; and related correspondence between the practitioner and the provider or entity. The report must include situations in which employment or privileges have been revoked, suspended, limited or otherwise adversely affected by action of the health care practitioner while the health care practitioner was the subject of disciplinary proceedings, and it also must include situations where employment or privileges have been revoked, suspended, limited or otherwise adversely affected by act of the health care practitioner in return for the health care provider or health care entity terminating such proceeding. Any reversal, modification or change of action reported pursuant to this section must be reported immediately to the practitioner's board or authority, together with a brief statement of the reasons for that reversal, modification or change. The failure of any health care provider or health care entity to report as required is a civil violation for which a fine of not more than $1,000 may be adjudged.

Carriers providing managed care plans are subject to the reporting requirements of this section when they take adverse actions against a practitioner's credentials or employment for reasons related to clinical competence or unprofessional conduct that may adversely affect the health or welfare of the patient.

Sec. 6. 24 MRSA §2508, as enacted by PL 1977, c. 492, §3, is amended to read:

§2508. Effect of filing

The filing of a report with the board pursuant to this chapter, investigation by the board or any disposition by the board ~~shall~~ may not, in and of itself, preclude any action by a hospital or other health care facility or health care entity or professional society comprised primarily of physicians to suspend, restrict or revoke the privileges or membership of the physician.

Sec. 7. 24 MRSA §§2510-A and 2510-B are enacted to read:

§2510-A. Confidentiality of professional competence review records

Except as otherwise provided by this chapter, all professional competence review records are privileged and confidential and are not subject to discovery, subpoena or other

means of legal compulsion for their release to any person or entity and are not admissible as evidence in any civil, judicial or administrative proceeding. Information contained in professional competence review records is not admissible at trial or deposition in the form of testimony by an individual who participated in the written professional competence review process. Nothing in this section may be read to abrogate the obligations to report and provide information under section 2506, nor the application of Title 32, sections 2599 and 3296.

1. Protection; waiver. This chapter's protection may be invoked by a professional competence committee or by the subject of professional competence review activity in any civil, judicial or administrative proceeding. This section's protection may be waived only by a written waiver executed by an authorized representative of the professional competence committee.

2. Adverse professional competence review action. Subsection 1 does not apply in a proceeding in which a physician contests an adverse professional competence review action against that physician, but the discovery, use and introduction of professional competence review records in such a proceeding does not constitute a waiver of subsection 1 in any other or subsequent proceedings seeking damages for alleged professional negligence against the physician who is the subject of such professional competence review records.

3. Defense of professional competence committee. Subsection 1 does not apply in a proceeding in which a professional competence committee uses professional competence review records in its own defense, but the discovery, use and introduction of professional competence review records in such a proceeding does not constitute a waiver of subsection 1 in the same or other proceeding seeking damages for alleged professional negligence against the physician who is the subject of such professional competence review records.

4. Waiver regarding individual. Waiver of subsection 1 in a proceeding regarding one physician does not constitute a waiver of subsection 1 as to other physicians.

§2510-B. Release of professional competence review records

Nothing in this section may be read to abrogate the obligations to report and provide information under section 2506.

1. Release to other review bodies, agencies, accrediting bodies. A professional competence committee may furnish professional competence review records or information to other professional review bodies, state or federal government agencies

and national accrediting bodies without waiving any privilege against disclosure under section 2510-A.

2. Release to physician. A professional competence committee may furnish professional competence review records to the physician who is the subject of the professional competence review activity and the physician's attorneys, agents and representatives without waiving any privilege against disclosure under section 2510-A.

3. Release of directory information. A professional competence committee may furnish directory information showing membership, clinical privileges, provider panel or other practice status of a physician with the health care entity to anyone without waiving the privilege against disclosure under section 2510-A.

Sec. 8. 24 MRSA §2511, first ¶, as amended by PL 1997, c. 271, §4, is further amended to read:

Any person acting without malice, any physician, podiatrist, health care provider, health care entity or professional society, any member of a professional competence committee or professional review committee, any board or appropriate authority and any entity required to report under this chapter are immune from civil liability:'

Further amend the bill by inserting at the end before the summary the following:

'FISCAL NOTE

The additional workload and administrative costs associated with the minimal number of new cases filed in the court system can be absorbed within the budgeted resources of the Judicial Department. The collection of additional fines may increase General Fund revenue by minor amounts.'

SUMMARY

This amendment replaces the bill. It amends the Maine Health Security Act to recognize that new health care entities have arisen since the adoption of the Act. This amendment makes the Act and its obligations and protections applicable to these new types of health care entities.

New terms are included in the Health Security Act: adverse professional competence review action; health care entity;

professional competence review activity, professional competence review records, professional competence committee and written professional competence review process.

The amendment provides confidentiality for written professional competence review records. The records cannot be released except by the professional competence committee, or by the physician when the physician challenges the committee's action. If a physician uses the records to contest an adverse action, the protection is not waived for other proceedings, including actions for professional negligence. If the professional competence committee uses the records in its own defense, the protection is not waived for other proceedings, including actions for professional negligence.

A professional competence committee may release professional competence review records to other professional review bodies, state and federal agencies, accrediting bodies and the physician who is the subject of the records without waiving the protection. The committee may release directory information to anyone without waiving the protection.

The amendment also adds a fiscal note to the bill.

118th MAINE LEGISLATURE

FIRST SPECIAL SESSION-1997

Legislative Document **No. 1728**

S.P. 571 In Senate, April 1, 1997

An Act to Promote Professional Competence and Improve Patient Care.

Reference to the Committee on Health and Human Services suggested and ordered printed.

JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator GOLDTHWAIT of Hancock.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 24 MRSA §2502, sub-§2-A is enacted to read:

2-A. Health care organization. "Health care organization" means a health care provider, an entity that contracts with health care practitioners or other health care providers to provide health care services or a professional corporation comprised of health care professionals. Such an organization must be licensed or otherwise authorized by the laws of this State and operate by written bylaws, policies and procedures approved by the organization's governing body. Health care organizations include, but are not limited to, physician-hospital organizations, nonprofit hospitals and medical service organizations authorized pursuant to Title 24, chapter 19 and, pursuant to Title 24-A, preferred provider organizations licensed pursuant to chapter 32, health maintenance organizations licensed pursuant to chapter 56 and hospitals, clinics, nursing homes, insurance carriers and long-term care facilities.

Sec. 2. 24 MRSA §2502, sub-§4, as enacted by PL 1977, c. 492, §3, is amended to read:

4. Professional competence committee. "Professional competence committee" means a committee of members of a professional society ~~or other~~ , of an organization of physicians or of a health care organization formed pursuant to state and federal law ~~and~~ that is authorized to evaluate medical and health care ~~service~~ services, or a committee of licensed professionals authorized or privileged to practice in or for any health care ~~facility, provided the medical~~ organization. The professional society ~~or other~~ , health care organization or ~~the~~ licensed medical staff ~~or~~ of the health care ~~facility operates~~ organization shall operate a professional competence committee pursuant to written ~~bylaws~~ governing documents that have been approved by the governing body of ~~such~~ that society, or organization ~~or facility~~ and must be authorized under such documents to conduct evaluations of medical and health care services.

Sec. 3. 24 MRSA §2502, sub-§8 is enacted to read:

8. Records. "Records" means all written or oral communications by a person provided to a professional competence committee, professional review committee or committee of the governing board of a health care organization, that arise from the activities of the organization's professional competence committee. Such records include, but are not limited to, the complaint, the response, correspondence related to the complaint and response, recordings or transcripts of proceedings, minutes,

formal recommendations, decisions, exhibits and other similar items or documents typically constituting the records of administrative proceedings.

Sec. 4. 24 MRSA §2503, as enacted by PL 1977, c. 492, §3, is amended to read:

§2503. Duties

The governing body of every ~~licensed hospital~~ health care organization shall ~~assure~~ ensure that:

1. Organization of medical staff. Its medical staff is organized pursuant to written bylaws that have been approved by the governing body;

2. Privileges. ~~Provider privileges~~ Privileges extended or subsequently renewed to any physician are in accordance with those recommended by the medical staff as being consistent with that physician's training, experience and professional competence;

3. Program for identification and prevention of medical injury. It has a program for the identification and prevention of medical injury ~~which shall include~~ that includes at least the following:

A. One or more professional competence committees with responsibility effectively to review the professional services rendered in the ~~facility~~ health care organization for the purpose of ~~insuring~~ ensuring quality of medical care of patients ~~therein. Such~~ That responsibility ~~shall~~ must include a review of the quality and necessity of medical care provided and the preventability of medical complications and deaths;

B. A grievance or complaint mechanism designed to process and resolve as promptly and effectively as possible grievances by patients or their representatives related to incidents, billing, inadequacies in treatment and other factors known to influence malpractice claims and suits;

C. A system for the continuous collection of data with respect to the ~~provider's~~ health care organization's experience with negative health care outcomes and incidents injurious to patients, whether or not they give rise to claims, patient grievances, ~~claims,~~ suits, professional liability premiums, settlements, awards, allocated and administrative costs of claims handling, costs of patient injury prevention and safety engineering activities, and other relevant statistics and information; and

D. Education programs for the ~~provider's~~ health care organization's staff personnel engaged in patient care activities dealing with patient safety, medical injury prevention, the legal aspects of patient care, problems of communication and rapport with patients and other relevant factors known to influence malpractice claims and suits; and

4. External professional competence committee. ~~Where~~ When the nature, size or location of the health care ~~provider~~ organization makes it advisable, the ~~provider~~ organization may, upon recommendation of its medical staff and approval by its governing body, utilize in place of an internal professional competence committee the services of an external professional competence committee or one formed jointly by 2 or more ~~providers~~ health care organizations.

Sec. 5. 24 MRSA §2503-A is enacted to read:

§2503-A. Process

1. Adverse evaluation. Under its governing documents or its organizational policies and procedures, a health care organization shall provide that a physician who is the subject of an adverse evaluation concerning professional competence is entitled to the following:

A. Notice of the specific complaints and issues forming the basis for an adverse evaluation;

B. Access to all patient records and complaints forming the basis for an adverse evaluation;

C. A hearing before a committee comprised of practitioners licensed at the same level as the practitioner under review;

D. Representation by counsel to confront witnesses and to present evidence or witnesses relevant to the complaints that form the basis for the adverse evaluation; and

E. A written decision identifying the reasons for the adverse evaluation.

2. Final action. A competence committee that is required to report its final actions to the Board of Licensure in Medicine or the Board of Osteopathic Licensure is not otherwise relieved of that obligation by any provision of this section.

Sec. 6. 24 MRSA §2506, as amended by PL 1989, c. 462, §1, is further amended to read:

§2506. Health care organization reports

A health care ~~provider~~ organization shall, within 60 days, report in writing to the disciplined practitioner's board or authority the name of any licensed, certified or registered employee or person privileged by the ~~provider~~ organization whose employment or privileges have been revoked, suspended, limited or terminated, together with pertinent information relating to that action. The report ~~shall~~ must include situations in which employment or privileges have been revoked, suspended, limited or otherwise adversely affected by action of the health care practitioner while the health care practitioner was the subject of disciplinary proceedings, and it also ~~shall~~ must include situations ~~where~~ in which employment or privileges have been revoked, suspended, limited or otherwise adversely affected by an act of the health care practitioner in return for the health care ~~provider~~ organization's terminating ~~such---proceeding~~ the proceedings. Any reversal, modification or change of action reported pursuant to this section ~~shall~~ must be reported immediately to the practitioner's board or authority, together with a brief statement of the reasons for that reversal, modification or change. The failure of ~~any--such~~ a health care ~~provider~~ organization to report as required is a civil violation for which a fine of not more than $1,000 may be adjudged.

Sec. 7. 24 MRSA §2508, as enacted by PL 1977, c. 492, §3, is amended to read:

§2508. Effect of filing

The filing of a report with the board pursuant to this chapter, investigation by the board or any disposition by the board ~~shall~~ does not, in and of itself, preclude any action by a ~~hospital---or---other~~ health care ~~facility~~ organization or professional society comprised primarily of physicians to suspend, restrict or revoke the privileges or membership of the physician.

Sec. 8. 24 MRSA §2510, as amended by PL 1993, c. 600, Pt. B, §§21 and 22, is further amended to read:

§2510. Confidentiality of information

1. Confidentiality; exceptions. Any reports, information or records received and maintained by the board, professional competence committee or professional review committee pursuant to this chapter, including any material received or developed by ~~the board~~ such an entity during an investigation ~~shall--be~~ are

confidential, except for information and data that ~~is~~ are developed or maintained by the board from reports or records received and maintained pursuant to this chapter or by the board during an investigation and that ~~does~~ do not identify or permit identification of any patient or physician~~;--provided-that--the~~. The board may also disclose ~~any~~ confidential information ~~only~~:

A. In a disciplinary hearing before the board or in any subsequent trial or appeal of a board action or order relating to ~~such~~ the disciplinary hearing;

B. To governmental licensing or disciplinary authorities of any jurisdiction or to any health care ~~providers~~ organizations located within or outside this State ~~which~~ that are concerned with granting, limiting or denying a physician's ~~hospital~~ privileges, ~~provided~~ except that the board shall include along with the transfer an indication as to whether or not the information has been substantiated by the board;

C. As required by section 2509, subsection 5;

D. Pursuant to an order of a court of competent jurisdiction; or

E. To qualified personnel for bona fide research or educational purposes, if personally identifiable information relating to any patient or physician is first deleted.

2. Confidentiality of orders in disciplinary proceedings. Orders of the board relating to disciplinary action against a physician, including orders or other actions of the board referring or scheduling matters for hearing, ~~shall~~ are not be confidential.

3. Availability of confidential information. ~~In--no--event may-confidential~~ Confidential information received, maintained or developed by the board, health care organization, professional competence committee or professional review committee, or disclosed by ~~the-board~~ such entities to others, pursuant to this chapter, or information, data, incident reports or recommendations gathered or made by or on behalf of a health care ~~provider~~ organization pursuant to this chapter, may not be available for discovery, court subpoena or introduced into evidence in any medical malpractice suit or other action for damages arising out of the provision or failure to provide health care services. This confidential information includes reports to and information gathered by both a professional competence committee and a professional review committee.

4. Penalty. ~~Any~~ A person who unlawfully discloses ~~such~~ confidential information possessed by the board ~~shall be guilty of~~ commits a Class E crime.

5. Physician-patient privilege; proceedings. The physician-patient privilege ~~shall~~, as a matter of law, ~~be~~ is deemed to have been waived by the patient and ~~shall~~ does not prevail in any investigation or proceeding by the board, health care organization, professional competence committee or professional review committee acting within the scope of its authority, ~~provided that~~ but the disclosure of any information pursuant to this subsection ~~shall~~ may not be deemed a waiver of ~~such~~ that privilege in any other proceeding. A person who voluntarily serves on a professional competence committee or professional review committee may not be required to testify in a disciplinary proceeding conducted by the board.

6. Disciplinary action. Disciplinary action by the Board of Licensure in Medicine ~~shall~~ must be in accordance with Title 32, chapter 48; disciplinary action by the Board of Osteopathic Licensure ~~shall~~ must be in accordance with Title 32, chapter 36.

Sec. 9. 24 MRSA §2511, first ¶, as amended by PL 1993, c. 600, Pt. A, §19, is further amended to read:

Any person acting without malice, and any physician, podiatrist, health care provider, health care organization, professional society or member of a professional competence committee, professional review committee or any board or appropriate authority is immune from civil liability:

SUMMARY

This bill expands physician peer review beyond hospital settings to include other types of settings where health care services are provided. The bill strengthens the ability of a licensed health care practitioner to become involved in providing information and reviewing another health care practitioner's competence to practice health care by specifying the confidentiality of communications about another health care practitioner, by defining a health care organization and that organization's duties and by expanding the peer review process outside of the hospital setting.

ACTIVITY SHEET

COMMITTEE: Judiciary

LD #: 1728

TITLE: An Act to Promote Professional Competance and Improve Patient Care

HEARING DATE: May 2, 1997

WORK SESSION DATES: April 17, 1997 - Carry-Over
February 5, 1998 - Tabled
February 23, 1998

REPORTED OUT DATE: March 18, 1998

COMMITTEE REPORT: OTP-AM

118th MAINE LEGISLATURE

FIRST SPECIAL SESSION-1997

Legislative Document **No. 1728**

S.P. 571 In Senate, April 1, 1997

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Secretary of the Senate

Presented by Senator GOLDTHWAIT of Hancock.

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Sec. 2. 24 MRSA §2502, sub-§4, as enacted by PL 1977, c. 492, §3, is amended to read:

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8. Records. "Records" means all written or oral communications by a person provided to a professional competence committee, professional review committee or committee of the governing board of a health care organization, that arise from the activities of the organization's professional competence committee. Such records include, but are not limited to, the complaint, the response, correspondence related to the complaint and response, recordings or transcripts of proceedings, minutes,

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3. Program for identification and prevention of medical injury. It has a program for the identification and prevention of medical injury ~~which shall include~~ that includes at least the following:

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C. A system for the continuous collection of data with respect to the ~~provider's~~ health care organization's experience with negative health care outcomes and incidents injurious to patients, whether or not they give rise to claims, patient grievances, ~~claims,~~ suits, professional liability premiums, settlements, awards, allocated and administrative costs of claims handling, costs of patient injury prevention and safety engineering activities, and other relevant statistics and information; and

D. Education programs for the ~~provider's~~ health care organization's staff personnel engaged in patient care activities dealing with patient safety, medical injury prevention, the legal aspects of patient care, problems of communication and rapport with patients and other relevant factors known to influence malpractice claims and suits; and

4. External professional competence committee. ~~Where~~ When the nature, size or location of the health care ~~provider~~ organization makes it advisable, the ~~provider~~ organization may, upon recommendation of its medical staff and approval by its governing body, utilize in place of an internal professional competence committee the services of an external professional competence committee or one formed jointly by 2 or more ~~providers~~ health care organizations.

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1. Adverse evaluation. Under its governing documents or its organizational policies and procedures, a health care organization shall provide that a physician who is the subject of an adverse evaluation concerning professional competence is entitled to the following:

A. Notice of the specific complaints and issues forming the basis for an adverse evaluation;

B. Access to all patient records and complaints forming the basis for an adverse evaluation;

C. A hearing before a committee comprised of practitioners licensed at the same level as the practitioner under review;

D. Representation by counsel to confront witnesses and to present evidence or witnesses relevant to the complaints that form the basis for the adverse evaluation; and

E. A written decision identifying the reasons for the adverse evaluation.

2. Final action. A competence committee that is required to report its final actions to the Board of Licensure in Medicine or the Board of Osteopathic Licensure is not otherwise relieved of that obligation by any provision of this section.

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confidential, except for information and data that ~~is~~ are developed or maintained by the board from reports or records received and maintained pursuant to this chapter or by the board during an investigation and that ~~does~~ do not identify or permit identification of any patient or physician~~;--provided--that--the~~. The board may also disclose ~~any~~ confidential information ~~only~~:

A. In a disciplinary hearing before the board or in any subsequent trial or appeal of a board action or order relating to ~~such~~ the disciplinary hearing;

B. To governmental licensing or disciplinary authorities of any jurisdiction or to any health care ~~providers~~ organizations located within or outside this State ~~which~~ that are concerned with granting, limiting or denying a physician's ~~hospital~~ privileges, ~~provided~~ except that the board shall include along with the transfer an indication as to whether or not the information has been substantiated by the board;

C. As required by section 2509, subsection 5;

D. Pursuant to an order of a court of competent jurisdiction; or

E. To qualified personnel for bona fide research or educational purposes, if personally identifiable information relating to any patient or physician is first deleted.

2. Confidentiality of orders in disciplinary proceedings. Orders of the board relating to disciplinary action against a physician, including orders or other actions of the board referring or scheduling matters for hearing, ~~shall~~ are not be confidential.

3. Availability of confidential information. ~~In--no--event may--confidential~~ Confidential information received, maintained or developed by the board, health care organization, professional competence committee or professional review committee, or disclosed by ~~the--board~~ such entities to others, pursuant to this chapter, or information, data, incident reports or recommendations gathered or made by or on behalf of a health care ~~provider~~ organization pursuant to this chapter, may not be available for discovery, court subpoena or introduced into evidence in any medical malpractice suit or other action for damages arising out of the provision or failure to provide health care services. This confidential information includes reports to and information gathered by both a professional competence committee and a professional review committee.

4. Penalty. ~~Any~~ A person who unlawfully discloses ~~such~~ confidential information possessed by the board ~~shall be guilty of~~ commits a Class E crime.

5. Physician-patient privilege; proceedings. The physician-patient privilege ~~shall~~, as a matter of law, be is deemed to have been waived by the patient and ~~shall~~ does not prevail in any investigation or proceeding by the board, health care organization, professional competence committee or professional review committee acting within the scope of its authority, ~~provided that~~ but the disclosure of any information pursuant to this subsection ~~shall~~ may not be deemed a waiver of ~~such~~ that privilege in any other proceeding. A person who voluntarily serves on a professional competence committee or professional review committee may not be required to testify in a disciplinary proceeding conducted by the board.

6. Disciplinary action. Disciplinary action by the Board of Licensure in Medicine ~~shall~~ must be in accordance with Title 32, chapter 48; disciplinary action by the Board of Osteopathic Licensure ~~shall~~ must be in accordance with Title 32, chapter 36.

Sec. 9. 24 MRSA §2511, first ¶, as amended by PL 1993, c. 600, Pt. A, §19, is further amended to read:

Any person acting without malice, and any physician, podiatrist, health care provider, health care organization, professional society or member of a professional competence committee, professional review committee or any board or appropriate authority is immune from civil liability:

SUMMARY

This bill expands physician peer review beyond hospital settings to include other types of settings where health care services are provided. The bill strengthens the ability of a licensed health care practitioner to become involved in providing information and reviewing another health care practitioner's competence to practice health care by specifying the confidentiality of communications about another health care practitioner, by defining a health care organization and that organization's duties and by expanding the peer review process outside of the hospital setting.

ONE HUNDRED AND EIGHTEENTH LEGISLATURE

COMMITTEE ON JUDICIARY

April 18, 1997

TO: Hon. Mark W. Lawrence, President of the Senate
Hon. Elizabeth H. Mitchell, Speaker of the House

FROM: Sen. Susan W. Longley, Senate Chair
Rep. Richard H. Thompson, House Chair
Joint Standing Committee on Judiciary

Re: Carryover requests

The Joint Standing Committee on Judiciary has voted to carry over to the Second Regular Session the following bills.

LD	Title	Reason	Interim Committee work
76	**An Act to Amend the Uniform Health-Care Decisions Law**	Additional information and resolution of conflicts among affected parties necessary	none
916	**An Act to Allow Physician-assisted Deaths for the Terminally Ill**	Awaiting US Supreme Court decision	none
964	**An Act to Transfer Certain Tribal Holdings into a Trust**	Awaiting recommendation by the Maine Indian Tribal-State Commission	none
1328	**An Act to Enact the Uniform Transfer on Death Security Act**	The Trusts & Estates Section of the Maine State Bar Association has agreed to review and make recommendations to resolve conflicts with existing Maine law	none

115 STATE HOUSE STATION, AUGUSTA, MAINE 04333-0115 TELEPHONE 207-287-1327

1372	**An Act to Unify the Court System**	Additional information and participation with departments necessary (may make written request to Judicial Department and others to work on)	none
1384	**An Act to Reform Procedures in Multiparty Lawsuits**	Additional information and resolution of conflicts among affected parties necessary	none

TORT BILLS

We would like to handle all the medical malpractice and tort bills together, using a comprehensive approach. The Bureau of Insurance is currently in the midst of a study (required by Resolves 1995, c. 76) concerning the screening panels for medical malpractice claims. It would be premature to take action on the bills without the results of the study in hand.

LD	Title	Interim Committee work
29	**An Act to Amend the Wrongful Death Laws**	none
30	**An Act to Exclude Intentional Tort Claims from the Application of the Maine Workers' Compensation Act of 1992**	none
582	**An Act to Amend the Procedures for Medical Malpractice Screenings**	none
869	**An Act to Amend the Statute of Limitations for Health Care Providers and Health Care Practitioners to Include a Discovery Rule**	none
1050	**An Act to Revise the Prelitigation Malpractice Screening Panel Procedures, Criteria and Composition**	none
1057	**An Act to Amend the Laws Regarding Wrongful Death and Recoveries for Wrongful Death**	none
1181	**An Act to Change the Comparative Negligence Laws**	none
1636	**An Act to Make Mediation Mandatory in Medical Malpractice Screenings** (PH scheduled for 5/2) - anticipated carryover vote)	none

1728	**An Act to Promote Professional Competence and Improve Patient Care** (PH scheduled for 5/5) (anticipated carryover)	none
1784	**An Act to Expedite the Operation of Prelitigation Screening Panels under the Health Security Act** (PH scheduled for 5/5) (anticipated carryover vote)	none

Thank you for your understanding of the workload of the Committee and the complexity of the issues facing us. Please contact us if you have any questions.

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STATE OF MAINE
118TH LEGISLATURE

LEGISLATIVE NOTICES

JOINT STANDING COMMITTEE ON JUDICIARY

Sen. Susan W. Longley, Senate Chair
Rep. Richard H. Thompson, House Chair

PUBLIC HEARING: Friday, May 2, 1997, 1:00 pm, Room 438 State House

(L.D. 1728) Bill "An Act to Promote Professional Competence and Improve Patient Care" (S.P.0571) (Presented by Senator GOLDTHWAIT of Hancock)

(L.D. 1636) Bill "An Act to Make Mediation Mandatory in Medical Malpractice Proceedings" (S.P.0531) (Presented by Senator MILLS of Somerset)

(L.D. 1784) Bill "An Act to Expedite the Operation of Prelitigation Screening Panels under the Maine Health Security Act" (H.P.1257) (Presented by Representative THOMPSON of Naples)

(L.D. 732) Bill "An Act to Amend the Laws of Murder and Manslaughter to Include the Death of a Fetus" (H.P.0541) (Presented by Representative KASPRZAK of Newport) (Cosponsored by Senator CAREY of Kennebec, Representative AHEARNE of Madawaska, Representative BRAGDON of Bangor, Representative LANE of Enfield, Representative MACK of Standish, Representative VIGUE of Winslow, Representative WATERHOUSE of Bridgton)

(L.D. 1587) Bill "An Act to Establish Procedures for the Release of Confidential Information" (H.P.1131) (Presented by Representative BUNKER, JR. of Kossuth Township)

(L.D. 1614) Bill "An Act to Amend the Freedom of Access Laws" (H.P.1149) (Presented by Representative BROOKS of Winterport) (Cosponsored by Senator PINGREE of Knox, Representative BAGLEY of Machias, Representative BAKER of Bangor, Representative DUNLAP of Old Town, Representative JONES of Bar Harbor, Representative LAVERDIERE of Wilton, Representative O'NEIL of Saco, Representative PLOWMAN of Hampden, Representative WATSON of Farmingdale)

(L.D. 1639) Bill "An Act to Amend the Corporate Laws" (S.P.0534) (Presented by Senator LONGLEY of Waldo) Submitted by the Secretary of State pursuant to Joint Rule 204.

(L.D. 1559) Bill "An Act to Establish the Uniform Unclaimed Property Act" (H.P.1116) (Presented by Representative TAYLOR of Cumberland) (Cosponsored by Senator CAREY of Kennebec, Representative MADORE of Augusta, Representative MAYO III of Bath, Representative THOMPSON of Naples)

CONTACT PERSON: Susan Pinette
115 State House Station
Augusta, ME 04333-0115
287-1327

TESTIMONY SIGN IN SHEET

COMMITTEE ON JUDICIARY

L.D. # or CONFIRMATION: 1728 Improve PATIENT CARE

DATE: 2 Mai 1997

NEITHER FOR NOR AGAINST

NAME	TOWN/AFFILIATION	PROPONENT	OPPONENT
1. Rep. Elizabeth Watson	for Sen. Jill Goldthwait	✓	
2. Charlie Colton	Medical Mutual	✓	
3. Joan Cohen	Maine Med Assn	✓	
4. John Doyle	Preti/Flaherty	✓	
5. Andy McLean	Blue Cross/Blue Shield	✓	
6. Randall Manning	Board of Licencing	✓	
7. Glenn Griswold	Bur of Insurance		✓
8.			
9.			
10.			
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12.			
13.			
14.			
15.			
16.			

Testimony of
NYLCare HealthPlans of Maine, Inc.
in Support of L.D. 1728, With Proposed Amendments

Presented by:
John P. Doyle, Jr., Esq.
Preti, Flaherty, Beliveau & Pachios, LLC

May 2, 1997
before:
Judiciary Committee

Senate Chair Longley,
House Chair Thompson,

I am testifying today on behalf of NYLCare HealthPlans of Maine, Inc., to support the concepts behind LD 1728. At the same time, I am suggesting some specific changes to address the concerns of NYLCare and other managed care health carriers.

Before getting into the specifics, let me share with you some background on NYLCare. NYLCare established its New England regional headquarters in Portland last year, and now has 52 employees located there. NYLCare/Maine insures 57,000 Mainers in all areas of the State under a variety of health insurance products. NYLCare HealthPlans of Maine has approximately 7,000 members under either an HMO or Point of Service Plan. NYLCare's commitment to Maine was demonstrated further as one of only two bidders on the second bid process for

the Bureau of Medical Services HMO Medicaid HMO initiative. It is the only carrier offering an HMO product to Medicaid recipients at this time and is in the process of beginning to serve Medicaid beneficiaries.

Turning to LD 1728, NYLCare supports many of its concepts, but has concerns about others. Specifically, it supports State laws which promote confidentiality of peer review and related information, and which extend to participants in peer review, various immunities and protections. Recognition of these public policies is at the heart of the Maine Health Security Act as well as a number of other Maine laws. Vigorous and effective peer review can only be carried out in an environment where health professionals are assured of confidentiality of their findings and are made immune from subsequent lawsuits on the part of disgruntled practitioners. Further, it is critically important that the findings of peer review, quality assurance and related activities not be discoverable for purposes of subsequent malpractice suits. These and related policies are reflected in existing law, particularly in Section 2510 and 2511 of the Health Security Act and Section 3293 of Title 32, the Physician Licensure Statute.

The drafters of LD 1728 have sought to provide these protections in the context of insurance related activities by expanding the scope of the Health Security Act to cover a broader definition of "Health Care Organization" and "Professional Competence Committee". They have recognized that health carriers, malpractice carriers, and others beyond health care providers are also involved in utilization review, quality assurance, peer review, and credentialing activities. In order to encourage physicians and other practitioners to participate in these activities, they have determined to bring such activities within the scope

of the immunity and confidentiality protections provided by the Health Security Act.

NYLCare supports this goal, but objects to particular provisions of the Bill which would make health carriers subject to certain particular requirements which are better suited to hospitals and other health care providers, and do not really fit health insurers.

In particular, NYLCare is concerned with Sections 4 and 5 of the Bill. Section 4 amends an existing portion of the Health Security Act, which now applies only to hospitals, to cover "health organizations" generally. This Section, Section 2503, requires hospital boards to extend physician privileges in particular ways. It requires hospitals to establish various professional competence committees, grievance mechanisms, and reporting mechanisms. Many of these requirements have been drawn from JCAHO requirements, and historical practices of hospitals. Many of these practices simply do not apply to health insurers. Health insurers do "credential" practitioners based upon experience and training. They do not, extend "privileges" to these practitioners. Further, this activity is typically not done by the "governing body" of a health insurance carrier. Against this background, we suggest that Section 4 simply should not apply in a health insurance carrier context.

Section 5 of the bill seeks to modify the existing Health Security Act and bring certain of its provisions into closer conformance with the Federal Health Care Quality Improvement Act of 1986, 42 U.S.C. §11101, et seq. This Federal law, enacted in 1986, established the Federal Health Data Bank, among other

aspects. It also includes various "due process" requirements applicable to provider activities. Federal Law provides an option for certain HMOs, so-called "staff models", which engage in the direct provision of health care to come within its provisions. It does not, apply broadly to health carriers and a number of its features do not really fit the carrier context.

Beyond this, a number of features of Section 5 conflict with the existing Law governing health carriers as set forth in the Maine Health Improvement Act, 24-A M.R.S.A. §4301, et seq. The Health Plan Improvement Act grew out of the Banking and Insurance Committee's consideration of LDs 1512 and 1882 during the last session. Many of the provisions proposed in Section 5 of LD 1728 go well beyond, or are inconsistent with the "credentialing" sections of this recent legislation, 24-A M.R.S.A. §4303(2). In addition, they are also inconsistent with this Session's LD 546, as amended by Senate Amendment 113, which has recently been enacted in both the House and Senate. A copy of this Amendment is attached for ease of reference. While it does afford certain due process protections, the LD 546 Amendment does not set forth all the "bells and whistles" of proposed Section 2503-A of the Health Security Act.

For example, the approach in LD 1728 requires that the hearing panel be comprised of "practitioners licensed at the same level as the practitioner under review" and that practitioners have a right to counsel and a right to confront witnesses. In contrast, LD 546 states that of the three persons on a hearing panel, at least one must be a "clinical peer in the same discipline in the same or similar specialty".

NYLCare believes that it is appropriate that there be differences recognized in the grievance process affecting the selection determination for health carriers as opposed to requirements affecting hospitals seeking to remove privileges from a physician.

In order to resolve these concerns, we have a couple of suggestions.

Fundamentally, we ask that this Committee address this policy issue by not deeming health insurance carriers to be health organizations subject to the Health Security Act, but instead look to the provisions of existing law governing HMOs and determine to apply these generally to health carriers. Here, I am attaching a copy of 24-A M.R.S.A. §4224. This Section establishes provisions governing confidentiality immunity and access to records. It applies now to certain "quality assurance" activities on the part of HMOs. NYLCare suggests that this Section be restated and incorporated into the Health Plan Improvement Act in order that it apply broadly to the term "carrier" as defined in Section 4301. We also suggest that the term "quality assurance committee" be broadened to recognize various other activities carried out by health carriers including credentialing and utilization review activities in which physicians and other practitioners are involved.

Second, we propose that LD 1728 be modified to remove the very broad definition of health care organization set forth in Section 1 so that this excludes references to carriers, with the possible exception of those carriers who have "staff

model" HMOs and affirmatively seek to come within the scope of the Health Security Act.

Prior to the hearing, we have met with representatives of Medical Mutual, Blue Cross, the Maine Hospital Association, the Maine Medical Association, and others to discuss these concerns and concepts and are willing to work further with them to resolve these concerns.

Recognizing that very little time is left in your current Session, we suggest that consideration be given to holding this bill over to the Second Session in order to permit sufficient time to complete this process.

We would be happy to respond to any questions you have.

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[4] 24-A M.R.S.A. § 2670 et seq.
[5] 24-A M.R.S.A. § 4201 et seq.
[6] 24-A M.R.S.A. § 4301 et seq.

Historical and Statutory Notes

Amendments

1995 Amendment. Laws 1995, c. 673, § D-7, added subsec. 9.

§ 4224. Confidentiality; liability; access to records

1. **Confidentiality.** Any data or information pertaining to the diagnosis, treatment or health of an enrollee or applicant obtained from that enrollee or applicant or a provider by a health maintenance organization must be held in confidence and may not be disclosed to any person except: to the extent that it may be necessary to carry out the purposes of this chapter; upon the express consent of the enrollee or applicant; pursuant to statute or court order for the production of evidence or the discovery of evidence; or in the event of claim or litigation between that enrollee or applicant and the health maintenance organization when such data or information is pertinent. A health maintenance organization is entitled to claim any statutory privileges against such disclosure that the provider who furnished such information to the health maintenance organization is entitled to claim.

2. **Liability.** A person who, in good faith and without malice, as a member, agent or employee of a quality assurance committee, assists in the origination, investigation or preparation of a report or information related to treatment previously rendered, submits that report or information to a health maintenance organization or appropriate state licensing board, or assists the committee in carrying out any of its duties under this chapter is not subject to civil liability for damages as a consequence of those actions, nor is the health maintenance organization that established that committee or the officers, directors, employees or agents of that health maintenance organization liable for the activities of that person. This section may not be construed to relieve any person of liability arising from treatment of a patient.

A. The information considered by a quality assurance committee and the records of its actions and proceedings are confidential and not subject to subpoena or order to produce except in proceedings before the appropriate state licensing or certifying agency or in an appeal, if permitted, from the findings or recommendations of the committee. A member of a quality assurance committee or an officer, director, staff person or other member of a health maintenance organization engaged in assisting the committee or any person assisting or furnishing information to the committee may not be subpoenaed to testify in any judicial or quasi-judicial proceeding if the subpoena is based solely on these activities.

B. Information considered by a quality assurance committee and the records and proceedings of that committee used pursuant to paragraph A by a state licensing or certifying agency or in an appeal must be kept confidential and are subject to the same provisions concerning discovery and use in legal actions as are the original information and records in the possession and control of the health care review committee.

3. **Access to records.** To fulfill the obligations of a health maintenance organization under section 4204, subsection 2-A, paragraph B, a health maintenance organization must have access to treatment records and other information pertaining to the diagnosis, treatment and health status of any enrollee.

1991, c. 709, § 7.

Historical and Statutory Notes

Amendments

1991 Amendment. Laws 1991, c. 709, § 7, repealed and replaced this section, which had read:

"§ 4224. Confidentiality of medical information

"Any data or information pertaining to the diagnosis, treatment or health of any enrollee or appli-

TESTIMONY BEFORE
THE
JUDICIARY COMMITTEE
RE: L.D. 1728
May 2, 1997

By
Ronald J. Trahan
Medical Mutual Insurance Company of Maine

Senator Longley, Representative Thompson, Members of the Committee,

I am Ronald Trahan and I am speaking on behalf of Medical Mutual Insurance Company of Maine. Medical Mutual currently insures 1500 Maine physicians, nurse practitioners, nurse midwives, 8 hospitals, and 3 managed care organizations. In the past two decades Medical Mutual has worked with the Legislature to provide solutions in the area of medical malpractice.

Medical Mutual supports L.D. 1728 which extends the protection of the peer review process beyond hospital settings to include other types of settings where health care services are provided due to the significant shift in health care from fee-for-service to managed care. This extension is necessary to continue a commensurate protected peer review process outside the hospital setting. Medical Mutual has worked with the Maine Medical Association, the Maine Hospital Association, and other interested parties on this issue. We believe this bill is important to the Maine health care system, and if it is held over to the next session, we will continue to work with interested parties to resolve any concerns.

Thank you.

RJT/js

Testimony of Glenn J. Griswold
Maine Bureau of Insurance
Department of Professional and Financial Regulation

Neither for Nor Against L.D. 1728
An Act to Promote Professional Competence and Improve Patient Care.

Senator Longley, Representative Thompson, members of the Judiciary Committee, I am Glenn Griswold from the Maine Bureau of Insurance. The Maine Bureau of Insurance is neither for nor against L.D. 1728, "An Act to Promote Professional Competence and Improve Patient Care."

The Bureau would like to point out that this bill includes the undefined term "physician-hospital organization" as one type of health care organization that is to be subject to the requirements of the insurance code. No regulatory agency currently licenses or registers "physician-hospital organizations," or PHOs, a term which is used to refer to a variety of contractual risk-sharing arrangements among health care providers.

While the Bureau does not believe it is the intent of this bill to require that the Bureau license, register or review physician-hospital organizations for compliance with this bill, this provision is not clear as presently drafted. The Bureau suggests that reference to physician-hospital organizations be deleted or modified to indicate the extent of any responsibility the Bureau has to license, register or review physician-hospital organizations' compliance with this bill.

If it is the intent of this committee to require the Bureau of Insurance to license, register or review physician-hospital organizations the fiscal note that the Bureau provided on this legislation must be changed to reflect the level of intervention required to meet these new responsibilities. If physician-hospital organizations were exempted from the provisions of this bill it may create an unlevel playing field for the regulated entities identified in this bill that directly compete with PHO's to provide services to insured individuals.

I would be glad to answer any questions you may have.

STATE OF MAINE
BOARD OF LICENSURE IN MEDICINE
137 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0137

ANGUS S. KING, JR.
GOVERNOR

RANDAL C. MANNING
EXECUTIVE DIRECTOR

MEMORANDUM

DATE: February 5, 1998
TO: Senator Judy Paradis, Chair
Representative J. Elizabeth Mitchell, Chair
Joint Standing Committee on Health and Human Services
FROM: Board of Licensure in Medicine
SUBJECT: Proposed LD 1728 Amendments

The Board of Licensure in Medicine believes that peer review is a significant tool for improving medical care. The process, whereby medical professionals meet together in a non punitive environment to discuss specific treatment techniques and outcomes so as to improve patient care is a well recognized longstanding positive tool for quality improvement.

The Board believes that peer review groups working within the managed care arena should be afforded every protection and confidentiality provision available to hospital based peer review functions.

The board has a concern however, when legislation appears to markedly diminish the Board's ability to gather information in order to fulfill its charge: the protection of the safety health and welfare of Maine citizens . There are now numerous cases alleging that decisions made by managed care organizations through the offices of their Medical Directors are in fact medically flawed. Further, at least one state medical board (Arizona) had its decision to discipline a medical director upheld by that state's Supreme Court.

The definitions offered in this language appear remarkably sweeping. They would seem to include every clinical treatment, protocol, utilization, decision or action as well as every personnel and business decision of the included "entities".

This board has been working closely with the Standing Business and Economic Development Committee to correct some of these issues through PL 271, passed in the 1997 regular session, and LD1580, now coming out of the committee. The focus is to guarantee appropriate protection of confidentiality for patients and providers, assure proper public oversight, and appropriate regulatory protection of the health and lives of the citizens of Maine.

If the committee goes forward with LD 1728, the Board requests there be specific language to exempt the Medical and Osteopathic Boards from the scope of LD 1728. We direct the committee's attention to 32 MRSA § 3296 which specifically directs the boards as to how peer review material will be handled and kept confidential. It is critical to the Boards' authority that they be allowed access to peer review information even though the documents themselves cannot and will not be used by the Board.

We'll be happy to respond to any need for additional information. Please contact the Executive Director of the Board, Randal Manning, at 287-3605 for a most rapid response.

OFFICE LOCATION: TWO BANGOR STREET, AUGUSTA, ME
PHONE: (207) 287-3601 FAX: (207) 287-6590

STATE OF MAINE
BOARD OF LICENSURE IN MEDICINE
137 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0137

ANGUS S. KING, JR.
GOVERNOR

RANDAL C. MANNING
EXECUTIVE DIRECTOR

May 2, 1997

Senator Susan W. Longley, Chair
Representative Richard H. Thompson, Chair
Joint Standing Committee on the Judiciary
112 State House Station
Augusta, ME 04333-0112

Subject: Public Hearing - L.D. 1728

Dear Senator Longley, Representative Thompson, and Members of the Committee:

The Board of Licensure in Medicine conceptually supports the intent of L.D. 1728 as expressed to Board representatives. It is appropriate to provide an equal measure of protection for peer review provided in any organized health care setting. Hospitals and their staffs are now protected when doing appropriate peer review; health care providers doing the same work in an organized health care setting should be protected.

The Board is concerned about certain technical difficulties between L.D. 1728 and L.D. 539, which is before the Business and Economic Development Committee. A positive report on L.D. 539 is expected out of committee very soon. L.D. 539 makes significant changes to the Health Securities Act (24 MRSA). It was carefully negotiated with and supported by most of the parties also involved with L.D. 1728.

Certain issues of definition in L.D. 1728 need clarification. Also, the peer review protection intended here should be located in a more appropriate area of the statute, reserving 24 MRSA §2510 to the Medical Boards as intended in the original legislation.

Another piece of legislation, L.D. 546, which passed both houses of the Legislature this week, may provide some of the protections sought. These bills should be coordinated in order to eliminate statutory conflict.

The Board has had preliminary discussions with supporters of L.D. 1728 and all parties appear willing to continue work toward the best solution. This coordinating work will take time to complete. Please feel free to contact the Board offices if we may provide any information.

Sincerely,

Randal C. Manning
Executive Director

cc: Board members
Christina Valar, PFR

OFFICE LOCATION: TWO BANGOR STREET, AUGUSTA, ME
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current Law

LD 1728

CHAPTER 21
MAINE HEALTH SECURITY ACT

SUBCHAPTER I
PROFESSIONAL COMPETENCE REPORTS

24 § 2501. Short title

This Act shall be known as the Maine Health Security Act.

24 § 2502. Definitions

As used in this chapter, unless the context indicates otherwise, the following words shall have the following meanings.

1. Board. "Board" means the Board of Licensure in Medicine, the Board of Dental Examiners or the Board of Osteopathic Licensure.

1-A. Health care practitioner. "Health care practitioner" means physicians and all others certified, registered or licensed in the healing arts, including, but not limited to, nurses, podiatrists, optometrists, chiropractors, physical therapists, dentists, psychologists and physicians' assistants.

1-B. Carrier. "Carrier" has the same meaning as in Title 24-A, chapter 56-A.

2. Health care provider. "Health care provider" means any hospital, clinic, nursing home or other facility in which skilled nursing care or medical services are prescribed by or performed under the general direction of persons licensed to practice medicine, dentistry, podiatry or surgery in this State and which is licensed or otherwise authorized by the laws of this State.

2-A. Managed care plan. "Managed care plan" has the same meaning as in Title 24-A, chapter 56-A.

3. Physician. "Physician" means any natural person authorized by law to practice medicine or osteopathic medicine within this State.

4. Professional competence committee. "Professional competence committee" means a committee of members of a professional society or other organization of physicians formed pursuant to state and federal law and authorized to evaluate medical and health care service, or a committee of licensed professionals authorized or privileged to practice in any health care facility, provided the medical society or other organization or the medical staff or the health care facility operates pursuant to written bylaws that have been approved by the governing body of such society, organization or facility.

4-A. Professional review committee. "Professional review committee" means a committee of physicians, dentists or a combination of members of both professions formed by a professional society for the purpose of identifying and working with physicians, dentists and other licensees of the Board of Dental Examiners and physician assistants who are disabled or impaired by virtue of physical or mental infirmity or by the misuse of alcohol or drugs, as long as the committee operates pursuant to protocols approved by the Board of Licensure in Medicine, the Board of Dental Examiners or the Board of Osteopathic Licensure.

5. Professional society. "Professional society" means a state professional organization of physicians, surgeons or osteopathic physicians.

6. Action for professional negligence. "Action for professional negligence" means any action for damages for injury or death against any health care provider, its agents or employees, or health care practitioner, his agents or employees, whether based upon tort or breach of contract or otherwise, arising out of the provision or failure to provide health care services.

7. Professional negligence. "Professional negligence" means that:

A. There is a reasonable medical or professional probability that the acts or omissions complained of constitute a deviation from the applicable standard of care by the health care practitioner or health care provider charged with that care; and

B. There is a reasonable medical or professional probability that the acts or omissions complained of proximately caused the injury complained of.

24 § 2503. Hospital duties

The governing body of every licensed hospital shall assure that:

1. Organization of medical staff. Its medical staff is organized pursuant to written bylaws that have been approved by the governing body;

2. Provider privileges. Provider privileges extended or subsequently renewed to any physician are in accordance with those recommended by the medical staff as being consistent with that physician's training, experience and professional competence;

3. Program for identification and prevention of medical injury. It has a program for the identification and prevention of medical injury which shall include at least the following:

A. One or more professional competence committees with responsibility effectively to review the professional services rendered in the facility for the purpose of insuring quality of medical care of patients therein. Such responsibility shall include a review of the quality and necessity of medical care provided and the preventability of medical complications and deaths;

B. A grievance or complaint mechanism designed to process and resolve as promptly and effectively as possible grievances by patients or their representatives related to incidents, billing, inadequacies in treatment and other factors known to influence malpractice claims and suits;

C. A system for the continuous collection of data with respect to the provider's experience with negative health care outcomes and incidents injurious to patients, whether or not they give rise to claims, patient grievances, claims, suits, professional liability premiums, settlements, awards, allocated and administrative costs of claims handling, costs of patient injury prevention and safety

engineering activities, and other relevant statistics and information; and

D. Education programs for the provider's staff personnel engaged in patient care activities dealing with patient safety, medical injury prevention, the legal aspects of patient care, problems of communication and rapport with patients and other relevant factors known to influence malpractice claims and suits; and

4. External professional competence committee. Where the nature, size or location of the health care provider makes it advisable, the provider may, upon recommendation of its medical staff, utilize the services of an external professional competence committee or one formed jointly by 2 or more providers.

24 § 2504. Professional societies

Every state professional society shall establish a professional competence committee of its members pursuant to written bylaws approved by the society's governing board. The committee shall receive, investigate and determine the accuracy of any report made to the society of any member physician's acts amounting to gross or repeated medical malpractice, habitual drunkenness, addiction to the use of drugs or professional incompetence.

24 § 2505. Committee reports

Any professional competence committee within this State and any physician licensed to practice or otherwise lawfully practicing within this State shall, and any other person may, report the relevant facts to the appropriate board relating to the acts of any physician in this State if, in the opinion of the committee, physician or other person, the committee or individual has reasonable knowledge of acts of the physician amounting to gross or repeated medical malpractice, habitual drunkenness, addiction to the use of drugs or professional incompetence. The failure of any such professional competence committee or any such physician to report as required is a civil violation for which a fine of not more than $1,000 may be adjudged.

Except for specific protocols developed by a board pursuant to Title 32, section 1073, 2596-A or 3298, a physician, dentist or committee is not responsible for reporting misuse of alcohol or drugs or professional incompetence or malpractice as a result of physical or mental infirmity or by the misuse of alcohol or drugs discovered by the physician, dentist or committee as a result of participation or membership in a professional review committee or with respect to any information acquired concerning misuse of alcohol or drugs or professional incompetence or malpractice as a result of physical or mental infirmity or by the misuse of alcohol or drugs, as long as that information is reported to the professional review committee. Nothing in this section may prohibit an impaired physician or dentist from seeking alternative forms of treatment.

24 § 2506. Provider and carrier reports

A health care provider shall, within 60 days, report in writing to the disciplined practitioner's board or authority the name of any licensed, certified or registered employee or person privileged by the provider whose employment or privileges have been revoked, suspended, limited or terminated or who resigned while under investigation or to avoid investigation for reasons related to clinical competence or unprofessional conduct, together with pertinent information relating to that action. Pertinent information includes a description of the adverse action, the date, the location and a description of the event or events giving rise to the adverse action. Upon request, the following information must be released to the board or authority: medical records relating to the event or events; written statements signed or prepared by any witness or complainant to the event; and related correspondence between the practitioner and the provider. The report must include situations in which employment or privileges have been revoked, suspended, limited or otherwise adversely affected by action of the health care practitioner while the health care practitioner was the subject of disciplinary proceedings, and it also must include situations where employment or privileges have been revoked, suspended, limited or otherwise adversely affected by act of the health care practitioner in return for the health care provider terminating such proceeding. Any reversal, modification or change of action reported pursuant to this section must be reported immediately to the practitioner's board or authority, together with a brief statement of the reasons for that reversal, modification or change. The failure of any health care provider to report as required is a civil violation for which a fine of not more than $1,000 may be adjudged.

Carriers providing managed care plans are subject to the reporting requirements of this section when they take adverse actions against a practitioner's credentials or employment for reasons related to clinical competence or unprofessional conduct that may adversely affect the health or welfare of the patient.

24 § 2507. Society reports

Any professional society within this State which takes formal disciplinary action against a member relating to professional ethics, professional incompetence, moral turpitude, or drug or alcohol abuse shall, within 60 days of the action, report in writing to the appropriate board the name of the member, together with pertinent information relating to the action. The report shall include situations in which membership or privileges have been revoked, suspended, limited or otherwise adversely affected by action of the health care practitioner while the health care practitioner was under investigation or the subject of proceedings and it shall also include situations where membership or privileges have been revoked, suspended, limited or otherwise adversely affected by an act of the health care practitioner in return for the professional society's not conducting or for its ceasing such investigation proceeding. The report shall include situations under which an individual under societal investigation resigns during that pending investigation. The failure of any such society to report as required is a civil violation for which a fine of not more than $1,000 may be adjudged.

24 § 2508. Effect of filing

The filing of a report with the board pursuant to this chapter, investigation by the board or any disposition by the board shall not, in and of itself, preclude any action by a hospital or other health care facility or professional society comprised primarily of physicians to suspend, restrict or revoke the privileges or membership of the physician.

24 § 2509. Board records

1. Record of physicians. Each board shall create and maintain a permanent record of the names of all physicians licensed by it or otherwise

lawfully practicing in this State and subject to the board's jurisdiction along with an individual historical record for each physician relating to reports or other information furnished the board under this chapter or otherwise pursuant to law. The record may include, in accordance with rules established by the board, additional items relating to a physician's record of medical practice as will facilitate proper periodic review of the physician's professional competency.

2. Reports without merit; removal and destruction. Upon determination by the board that any report submitted to it is without merit, the report shall be removed from the physician's individual historical record and destroyed.

3. Forms; acceptance of other forms. The board shall provide forms for filing reports pursuant to this chapter. Reports submitted in other forms shall be accepted by the board.

4. Disclosure to physician. A physician shall be provided with a written notice of the substance of any information received pursuant to this chapter and placed in his individual historical record.

5. Examination of records by physician; response to information. A physician or his authorized representative shall have the right, upon request, to examine the physician's individual historical record which the board maintains pursuant to this chapter, and to place into the record a statement of reasonable length of the physician's view of the correctness or relevance of any information existing in the record. The statement shall at all times accompany that part of the record in contention. This subsection shall not apply to material submitted to the board in confidence prior to licensure by the board.

6. Court action for amendment or destruction. A physician has the right to seek through court action pursuant to the Maine Rules of Civil Procedure the amendment or destruction of any part of that physician's historical record in the possession of the board. When a physician initiates court action under this subsection, the board shall notify the persons who have filed complaints of the physician's request to amend these complaints or expunge them from the record. Notice to complainants must be sent to the last known address of the complainants. The notice must contain the name and address of the court to which a complainant may respond, the

specific change in the complaint that the physician is seeking or the complaint that the physician seeks to expunge, and the length of time that the complainant has to respond to the court. The board shall provide complainants with at least 60 days' notice from the date the notice is sent in which to respond.

7. Destruction of information. A board, subject to this section, may not amend or expunge any information from a physician's historical record that concerns complaints filed against the physician or disciplinary action taken by the board with respect to that physician unless the board is provided with evidence more probable than not that the complaint may be dismissed for lack of merit or does not raise to a level of misconduct sufficient to merit board action. If there is insufficient evidence to prove or disprove a complaint filed with the board, the historical record must indicate that evidence was insufficient to support disciplinary action.

24 § 2510. Confidentiality of information

1. Confidentiality; exceptions. Any reports, information or records received and maintained by the board pursuant to this chapter, including any material received or developed by the board during an investigation shall be confidential, except for information and data that is developed or maintained by the board from reports or records received and maintained pursuant to this chapter or by the board during an investigation and that does not identify or permit identification of any patient or physician; provided that the board may disclose any confidential information only:

A. In a disciplinary hearing before the board or in any subsequent trial or appeal of a board action or order relating to such disciplinary hearing;

B. To governmental licensing or disciplinary authorities of any jurisdiction or to any health care providers located within or outside this State which are concerned with granting, limiting or denying a physician's hospital privileges, provided that the board shall include along with the transfer an indication as to whether or not the information has been substantiated by the board;

C. As required by section 2509, subsection 5;

D. Pursuant to an order of a court of competent jurisdiction; or

E. To qualified personnel for bona fide research or educational purposes, if personally identifiable information relating to any patient or physician is first deleted.

2. Confidentiality of orders in disciplinary proceedings. Orders of the board relating to disciplinary action against a physician, including orders or other actions of the board referring or scheduling matters for hearing, shall not be confidential.

3. Availability of confidential information. In no event may confidential information received, maintained or developed by the board, or disclosed by the board to others, pursuant to this chapter, or information, data, incident reports or recommendations gathered or made by or on behalf of a health care provider pursuant to this chapter, be available for discovery, court subpoena or introduced into evidence in any medical malpractice suit or other action for damages arising out of the provision or failure to provide health care services. This confidential information includes reports to and information gathered by a professional review committee.

4. Penalty. Any person who unlawfully discloses such confidential information possessed by the board shall be guilty of a Class E crime.

5. Physician-patient privilege; proceedings by board. The physician-patient privilege shall, as a matter of law, be deemed to have been waived by the patient and shall not prevail in any investigation or proceeding by the board acting within the scope of its authority, provided that the disclosure of any information pursuant to this subsection shall not be deemed a waiver of such privilege in any other proceeding.

6. Disciplinary action. Disciplinary action by the Board of Licensure in Medicine shall be in accordance with Title 32, chapter 48; disciplinary action by the Board of Osteopathic Licensure shall be in accordance with Title 32, chapter 36.

24 § 2511. Immunity

Any person acting without malice, any physician, podiatrist, health care provider or professional society, any member of a professional

competence committee or professional review committee, any board or appropriate authority and any entity required to report under this chapter are immune from civil liability:

1. Reporting. For making any report or other information available to any board, appropriate authority, professional competence committee or professional review committee pursuant to law;

2. Assisting in preparation. For assisting in the origination, investigation or preparation of the report or information described in subsection 1; or

3. Assisting in duties. For assisting the board, authority or committee in carrying out any of its duties or functions provided by law.

24 § 2512. Appeal
(REPEALED)

SUBCHAPTER II
LIABILITY CLAIMS REPORTS

24 § 2601. Report of claim

Every insurer providing professional liability insurance in this State to a person licensed by the Board of Licensure in Medicine or the Board of Osteopathic Licensure or to any health care provider shall make a periodic report of claims made under the insurance to the department or board that regulates the insured. For purposes of this section, a claim is made whenever the insurer receives information from an insured, a patient of an insured or an attorney that an insured's liability for malpractice is asserted. The report must include:

1. Date and place. The date and place of the occurrence for which each claim was made;

1728

118th Maine Legislature

Mark W. Lawrence
President of the Senate

Elizabeth H. Mitchell
Speaker of the House

May 12, 1997

TO: Honorable Susan W. Longley, Senate Chair
Honorable Richard H. Thompson, House Chair
Joint Standing Committee on Judiciary

FROM: Mark W. Lawrence, President of the Senate MWL
Elizabeth H. Mitchell, Speaker of the House EHM

SUBJECT: Action on Carry Over Requests

We have reviewed your requests to carry bills over to the Second Regular Session, and the enclosed list confirms our action on those requests.

The bills that have been approved for carryover will be included in a Joint Order for final action by the entire Legislature at a later date, closer to final adjournment of the session.

We appreciate the time, thought, and effort that you and your Committee members continue to devote to completing work on a very large workload and would be happy to answer any questions you may have. Thank you again.

Enclosure

cc: John Wakefield, Office of Fiscal and Program Review
David Boulter, Office of Policy and Legal Analysis
Teen Griffin, Legislative Information Office

FOR REVIEW
VOTE: OTPA

Committee: JUD
LA: MJR
LR # and item number: 198502
New Title?: n
Add Emergency?: n
Date: 3/9/98
File Name: G:\OPLALHS\COMMTTEE\JUD\AMENDMTS\198502.DOC

COMMITTEE AMENDMENT "." TO LD 1728, An Act to Promote Professional Competence and Improve Patient Care

Amend the bill by striking out everything after the enacting clause and inserting in its place the following:

Sec. 1. 24 MRSA §2502, sub-§§1-C and 1-D are enacted to read:

1-C. Adverse professional competence review action. "Adverse professional competence review action" means an action based upon professional competence review activity to reduce, restrict, suspend, deny, revoke or fail to grant or renew a physician's:

A. Membership, clinical privileges, clinical practice authority or professional certification in a hospital or other health care entity; or

B. Participation on a health care entity's provider panel.

1-D. Health care entity. "Health care entity" means:

A. An entity that provides or arranges for health care services and that follows a written professional competence review process;

B. An entity that furnishes the services of physicians to another health care entity or to individuals and that follows a written professional competence review process; or

C. A professional society or professional certifying organization when conducting professional competence review activity.

Sec. 2. 24 MRSA §2502, sub-§4 is repealed and the following enacted in its place:

4. Professional competence committee. "Professional competence committee" means any of the following when engaging in professional competence review activity.

A. A health care entity;

B. An individual or group, such as a medical staff officer, department or committee, to which a health care entity delegates responsibility for professional competence review activity;

C. Entities and persons, including contractors, consultants, attorneys and staff, who assist in performing professional competence review activities; or

D. Joint committees of 2 or more health care entities.

Sec. 3. 24 MRSA §2502, sub-§4-B is enacted to read:

4-B. Professional competence review activity. "Professional competence review activity" means study, evaluation, investigation, recommendation or action by or on behalf of a health care entity, carried out by a professional competence committee, necessary to:

A. Maintain or improve the quality of care rendered in, through or by the health care entity or by physicians;

B. Reduce morbidity and mortality; or

C. Establish and enforce appropriate standards of professional qualification, competence, conduct or performance.

Sec. 4. 24 MRSA §2502, sub-§§8 and 9 are enacted to read:

8. Professional competence review records. "Professional competence review records" means the minutes, files, notes, records, reports, statements, memoranda, data bases, proceedings, findings and work product prepared at the request of or generated by a professional competence review committee relating to professional competence review activity. **Records received or considered by a professional competence committee during professional competence review activity are not "professional competence review records" if the records are individual medical or clinical records or any other record that was created for purposes other than professional competence review activity and is available from a source other than a professional competence review committee.**

9. Written professional competence review process. "Written professional competence review process" means a process that **is reduced to writing and** includes:

A. Written criteria adopted by the entity that are designed to form the primary basis for granting membership, privileges or participation in or through the health care entity. The health care entity shall furnish or make available for inspection and photocopying to a requesting physician the written criteria used by the entity; and

B. A mechanism through which individual physicians can:

(1) Be informed **in writing** of the basis of any adverse professional competence review action;

(2) Participate in a meeting or hearing with representatives of the health care entity at which time the facts upon which an adverse action is based and the basis for the adverse action can be discussed and reconsidered; and

(3) Receive a written explanation of any final adverse professional competence review action.

Sec. 5. 24 MRSA §2506 is amended to read:

§2506. Provider, entity and carrier reports

A health care provider or health care entity shall, within 60 days, report in writing to the disciplined practitioner's board or authority the name of any licensed, certified or registered employee or person privileged by the provider or entity whose employment or privileges have been revoked, suspended, limited or terminated or who resigned while under investigation or to avoid investigation for reasons related to clinical competence or unprofessional conduct, together with pertinent information relating to that action. Pertinent information includes a description of the adverse action, the date, the location and a description of the event or events giving rise to the adverse action. Upon request, the following information must be released to the board or authority: medical records relating to the event or events; written statements signed or prepared by any witness or complainant to the event; and related correspondence between the practitioner and the provider or entity. The report must include situations in which employment or privileges have been revoked, suspended, limited or otherwise adversely affected by action of the health care practitioner while the health care practitioner was the subject of disciplinary proceedings, and it also must include situations where employment or privileges have been revoked, suspended, limited or otherwise adversely affected by act of the health care practitioner in return for the health care provider or health care entity terminating such proceeding. Any reversal, modification or change of action reported pursuant to this section must be reported immediately to the practitioner's board or authority, together with a brief statement of the reasons for that reversal, modification or change. The failure of any health care provider or health care entity to report as required is a civil violation for which a fine of not more than $1,000 may be adjudged.

Carriers providing managed care plans are subject to the reporting requirements of this section when they take adverse actions against a practitioner's credentials or employment for reasons related to clinical competence or unprofessional conduct that may adversely affect the health or welfare of the patient.

Sec. 6. 24 MRSA §2508 is amended to read:

24 § 2508. Effect of filing

The filing of a report with the board pursuant to this chapter, investigation by the board or any disposition by the board shall not, in and of itself, preclude any action by a hospital or other health care facility or health care entity or professional society comprised primarily of physicians to suspend, restrict or revoke the privileges or membership of the physician.

Sec. 7. 24 MRSA §§2510-A and 2510-B are enacted to read:

§2510-A. Confidentiality of professional competence review records

Except as otherwise provided by this chapter, all professional competence review records are privileged and confidential and are not subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity and are not admissible as evidence in any civil, judicial or administrative proceeding. Information contained in professional competence review records is not admissible at trial or deposition in the form of testimony by an individual who participated in the professional competence review process. Nothing in this section may be read to abrogate the obligations to report and provide information under section 2506, nor the application of Title 32, sections 2599 and 3296.

1. Protection; waiver. This chapter's protection may be invoked by a professional competence review committee or by the subject of professional competence review activity in any civil, judicial or administrative proceeding. This section's protection may be waived only by a written waiver executed by an authorized representative of the professional competence review committee.

2. Adverse competence review action. Subsection 1 does not apply in a proceeding in which a physician contests adverse professional competence review action against that physician, but the discovery, use and introduction of professional competence review records in such a proceeding does not constitute a waiver of subsection 1 in any other or subsequent proceedings seeking damages for alleged professional negligence against the physician who is the subject of such professional competence review records.

3. Defense of professional competence review committee. Subsection 1 does not apply in a proceeding in which a professional competence review body uses professional competence review records in its own defense, but the discovery, use and introduction of professional review records in such a proceeding does not constitute a waiver of subsection 1 in the same or other proceeding seeking damages for alleged professional negligence against the physician who is the subject of such professional competence review records.

4. Waiver regarding individual. Waiver of subsection 1 in a proceeding regarding on physician does not constitute a waiver of subsection 1 as to other physicians.

§2510-B. Release of professional competence review records

Nothing in this section may be read to abrogate the obligations to report and provide information under section 2506.

1. Release to other review bodies, agencies, accrediting bodies. A professional competence review committee may furnish professional competence review records or information to other professional review bodies, state or federal government agencies and national accrediting bodies without waiving any privilege against disclosure under section 2510-A.

2. Release to physician. A professional competence review committee may furnish professional competence review records to the physician who is the subject of the professional competence review activity and the physician's attorneys, agents and representatives without waiving any privilege against disclosure under section 2510-A.

3. Release of directory information. A professional competence review body may furnish directory information showing membership, clinical privileges, provider panel or other practice status of a physician with the health care entity to anyone without waiving the privilege against disclosure under section 2510-A.

Sec. 8. 24 MRSA §2511 is amended to read:

24 § 2511. Immunity

Any person acting without malice, any physician, podiatrist, health care provider, health care entity or professional society, any member of a professional competence committee or professional review committee, any board or appropriate authority and any entity required to report under this chapter are immune from civil liability:

1. Reporting. For making any report or other information available to any board, appropriate authority, professional competence committee or professional review committee pursuant to law;

2. Assisting in preparation. For assisting in the origination, investigation or preparation of the report or information described in subsection 1; or

3. Assisting in duties. For assisting the board, authority or committee in carrying out any of its duties or functions provided by law.

SUMMARY

This amendment replaces the bill. It amends the Maine Health Security Act to recognize that new health care entities have arisen since the adoption of the Act. This amendment makes the Act and its obligations and protections applicable to these new types of health care entities.

New terms are included in the Health Security Act: adverse professional competence review action; health care entity; professional competence review activity, professional competence review records, professional competence committee and written professional competence review process.

The amendment provides confidentiality for professional competence review records. The records cannot be release except by the professional competence review committee, or by the physician when the physician challenges the review committee's action. If a physician uses the records to contest an adverse action, the protection is not waived for other proceedings, including actions for professional negligence. If the professional competence committee uses the records in its own defense, the protection is not waived for other proceedings, including actions for professional negligence.

A professional competence committee may release professional competence review records to other professional review bodies, state and federal agencies, accrediting bodies and the physician who is the subject of the records. The committee may release directory information to anyone without waiving the protection.

SUBMITTED BY
MEDICAL MUTUAL INS. CO.
Date:2/5/98

L.D. 1728

(Filing No. S-)

STATE OF MAINE
SENATE
118TH LEGISLATURE
SECOND REGULAR SESSION

COMMITTEE AMENDMENT ". " to S.P. 571, L.D. 1728, Bill, "An Act to Promote Professional Competence and Improve Patient Care "

Amend the bill by striking out everything after the enacting clause and before the summary and inserting in its place the following:

Sec. 1. 24 MRSA § 2502, sub-§§ 1-C & 1-D, are enacted to read:

1-C. Adverse professional competence review action. "Adverse professional competence review action" means an action based upon professional competence review activity to reduce, restrict, suspend, deny, revoke or fail to grant or renew a physician's:

A. Membership, clinical privileges, clinical practice authority or professional certification in a hospital or other health care entity.

B. Participation on a health care entity's provider panel.

1-D. Health care entity. "Health care entity" means:

A. An entity that provides or arranges for health care services and that follows a written professional competence review process; or

B. An entity that furnishes the services of physicians to another health care entity or to individuals and that follows a written professional competence review process: or

C. A professional society or professional certifying organization when conducting professional competence review activity.

Sec. 2. 24 MRSA § 2502, sub-§ 4, as enacted by P.L. 1977, c. 492, § 3, is repealed and the following enacted in its place:

4. Professional competence committee. "Professional competence committee" means any of the following when engaging in professional competence review activity:

A. A health care entity.

B. An individual or group, such as a medical staff officer, department or committee, to which a health care entity delegates responsibility for professional competence review activity.

C. Entities and persons with which a professional competence review body contracts for assistance in performing professional competence review activities.

D. Joint committees of two or more health care entities.

E. The officers, directors, employees , members, agents, consultants, attorneys and staff of a professional competence review body.

Sec. 3. 24 MRSA § 2502, sub-§§ 4-B, is enacted to read:

4-B "Professional competence review activity" means study, evaluation, investigation, recommendation or action by or on behalf of a health care entity to:

A. Maintain or improve the quality of care rendered in, through or by the health care entity or by physicians;

B. Reduce morbidity and mortality;

C. Require high individual standards of professional qualification, competence, conduct or performance;

D. Assure that services are provided in a cost-effective manner and that health care resources are used appropriately;

E. Enforce compliance with legal, ethical and behavioral standards applicable to physicians or the health care entity; or

F. Study or measure progress toward or compliance with goals and standards used to further the foregoing criteria, such as through quality improvement

studies, morbidity and mortality studies, or utilization management studies.

Sec. 4. 24 MRSA § 2502, sub-§§ 8 & 9, are enacted to read:

8. Professional competence review records. "Professional competence review records" means the minutes, files, notes, records, reports, statements, memoranda, data bases, proceedings, findings, and work product prepared at the request of or generated by a professional competence committee relating to professional competence review activity. The term does not include individual medical or clinical records or any other record created for purposes other than professional competence review activity and available from a source other than a professional competence committee simply because such record was received or considered by a professional competence committee during professional competence review activity.

9. "Written professional competence review process" means a process which:

A. Includes written criteria adopted by the entity, which are designed to form the primary basis for granting membership, privileges, or participation in or through the health care entity. The health care entity shall furnish or make available for inspection and photocopying to a requesting physician the written criteria used by the entity; and

B. Includes a written mechanism through which individual physicians can

(1) be informed of the basis of any adverse professional competence review action;

(2) participate in a meeting or hearing with representatives of the health care entity at which time the facts upon which an adverse action are based and the basis for the adverse action can be discussed and reconsidered; and

(3) receive a written explanation of any final adverse professional competence review action.

Sec. 5. 24 MRSA § 2506, as amended by P.L. 1997, c. 271, § 3, is further amended to read:

§2506. Provider, entity and carrier reports

A health care provider or entity shall within 60 days, report in writing to the disciplined practitioner's board or authority the name of any licensed, certified or registered employee or

person privileged by the provider or entity whose employment or privileges have been revoked, suspended, limited or terminated or who resigned while under investigation or to avoid investigation for reasons related to clinical competence or unprofessional conduct, together with pertinent information relating to that action. Pertinent information includes a description of the adverse action. Upon request, the following information must be released to the board authority: medical records relating to the event or events; written statements signed or prepared by any witness or complainant to the event; and related correspondence between the practitioner and the provider or entity. The report must include situations in which employment or privileges have been revoked, suspended, limited or otherwise adversely affected by act of the care practitioner in return for the health care provider or entity terminating such proceeding. Any reversal, modification or change of action reported pursuant to this section must be reported immediately to the practitioner's board or authority, together with a brief statement of the reasons for that reversal, modification or change. The failure of any health care provider or entity to report as required is a civil violation for which a find of not more than $1,000.00 may be adjudged.

Carriers providing managed care plans are subject to the reporting requirements of the section when they take adverse actions against a practitioner's credentials or employment for reasons related to clinical competence or unprofessional conduct that may adversely affect the health or welfare of the patient.

Sec. 6. 24 MRSA § 2508, as enacted by P.L. 1977, c. 492, § 3, is amended to read:

§ 2508. Effect of filing

The filing of a report with the board pursuant to this chapter, investigation by the board or any disposition by the board shall not, in and of itself, preclude any action by a hospital or other health care facility or entity or professional society comprised primarily of physicians to suspend, restrict or revoke the privileges or membership of the physician.

Sec. 7. 24 MRSA §§ 2510-A & 2510-B, are enacted to read:

§2510-A. Confidentiality of professional competence review records

Except as otherwise provided by this chapter, all professional competence review records are privileged and confidential and shall not be subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity or be admissible as evidence in any civil, judicial or administrative proceeding. Information contained in professional competence review records shall not be admissible at trial or deposition in the form of testimony by an individual who participated in the peer review process.

1. This chapter's protection may be invoked by a professional competence review

body or by the subject of professional competence review activity in any civil, judicial or administrative proceeding. This chapter's protection may be waived only by a written waiver executed by an authorized representative of the professional competence review body.

2. Subsection 1 shall not apply in a proceeding in which a physician contests adverse professional competence review action against him or her, but the discovery, use and introduction of professional competence review records in such a proceeding shall not constitute a waiver of subsection 1 in any other or subsequent proceedings seeking damages for alleged negligent act or omission against the physician who is the subject of such professional competence review records.

3. Subsection 1 shall not apply in a proceeding in which a professional competence review body uses professional competence review records in its own defense, but the discovery, use and introduction of professional review records in such a proceeding shall not constitute a waiver of subsection 1 or in the same or other proceeding seeking damages for alleged negligent act or omission against the physician who is the subject of such professional competence review records.

4. Waiver of subsection 1 in a proceeding regarding one physician does not constitute a waiver of subsection 1 as to other physicians.

§ 2510-B. Release of Professional Competence Review Records and Summaries

1. A professional review body may furnish professional competence review records, summaries or information to other professional review bodies, state or federal governmental agencies, and national accrediting bodies without waiving any privilege against disclosure under section 2510-A of this chapter.

2. A professional competence review body may furnish professional competence review records or professional competence review summaries to the affected physician and his or her attorneys, agents and representatives without waiving any privilege against disclosure under section 2510-A of this chapter.

3. A professional competence review body may furnish directory information showing the membership, clinical privileges, provider panel or other practice status of a physician with the health care entity to anyone without waiving the privilege against disclosure under section 2510-A of this chapter.

Sec. 8. 24 MRSA § 2511, 1st ¶, as amended by P.L. 1997, c. 271, § 4, is further amended to read:

Any person acting without malice, any physician, podiatrist, health care provider, health care entity or professional society, any member of a professional competence committee or professional review committee, any board or appropriate authority and any entity required to report under this chapter are immune from civil liability:

Summary

This amendment replaces the bill. The amendment amends the Maine Health Security Act to recognize that new health care entities have arisen since the adoption of the Act. This amendment makes applicable the Act, and its obligations and protections, to these new types of health care entities.

JOHN D. WAKEFIELD
Director

JAMES A. CLAIR
Deputy Director

Date: 12/15/97 ORIGINAL
Hearing Date: 05/02/97
Committee: Judiciary

Maine State Legislature
OFFICE OF FISCAL AND PROGRAM REVIEW
Augusta, Maine 04333

TO: Senate Chair - Sen. S. Longley

House Chair - Rep. R. Thompson

Sponsor - Sen. Goldthwait of Hancock

FROM: Grant T. Pennoyer, Principal Analyst

SUBJECT: FISCAL NOTE INFORMATION FOR **LD 1728**

An Act to Promote Professional Competence and Improve Patient Care

Comments:

The additional workload and administrative costs associated with the minimal number of new cases filed in the court system can be absorbed within the budgeted resources of the Judicial Department. The collection of additional fines may increase General Fund revenue by minor amounts.

Judiciary

STATE OF MAINE

118th Legislature

OFFICE OF FISCAL AND PROGRAM REVIEW

04/15/98

S.P. 571 - L.D. 1728

CURRENT TITLE: An Act to Promote Professional Competence and Improve Patient Care

Committee: Judiciary
Fiscal Impact of LD: Minor Costs

This Fiscal Note is for the bill as Engrossed with the Following Amendments:

C "A" (S-543) No Fiscal Impact

FISCAL NOTE

The additional workload and administrative costs associated with the minimal number of new cases filed in the court system can be absorbed within the budgeted resources of the Judicial Department. The collection of additional fines may increase General Fund revenue by minor amounts.

L.D. 1728

DATE: (Filing No. S-)

JUDICIARY

Reported by:

Reproduced and distributed under the direction of the Secretary of the Senate.

STATE OF MAINE
SENATE
118TH LEGISLATURE
SECOND REGULAR SESSION

COMMITTEE AMENDMENT " " to S.P. 571, L.D. 1728, Bill, "An Act to Promote Professional Competence and Improve Patient Care"

Amend the bill by striking out everything after the enacting clause and before the summary and inserting in its place the following:

'**Sec. 1. 24 MRSA §2502, sub-§§1-C and 1-D** are enacted to read:

1-C. Adverse professional competence review action. "Adverse professional competence review action" means an action based upon professional competence review activity to reduce, restrict, suspend, deny, revoke or fail to grant or renew a physician's:

A. Membership, clinical privileges, clinical practice authority or professional certification in a hospital or other health care entity; or

B. Participation on a health care entity's provider panel.

1-D. Health care entity. "Health care entity" means:

A. An entity that provides or arranges for health care services and that follows a written professional competence review process;

COMMITTEE AMENDMENT

B. An entity that furnishes the services of physicians to another health care entity or to individuals and that follows a written professional competence review process; or

C. A professional society or professional certifying organization when conducting professional competence review activity.

Sec. 2. 24 MRSA §2502, sub-§4, as enacted by PL 1977, c. 492, §3, is repealed and the following enacted in its place:

4. Professional competence committee. "Professional competence committee" means any of the following when engaging in professional competence review activity:

A. A health care entity;

B. An individual or group, such as a medical staff officer, department or committee, to which a health care entity delegates responsibility for professional competence review activity;

C. Entities and persons, including contractors, consultants, attorneys and staff, who assist in performing professional competence review activities; or

D. Joint committees of 2 or more health care entities.

Sec. 3. 24 MRSA §2502, sub-§4-B is enacted to read:

4-B. Professional competence review activity. "Professional competence review activity" means study, evaluation, investigation, recommendation or action, by or on behalf of a health care entity and carried out by a professional competence committee, necessary to:

A. Maintain or improve the quality of care rendered in, through or by the health care entity or by physicians;

B. Reduce morbidity and mortality; or

C. Establish and enforce appropriate standards of professional qualification, competence, conduct or performance.

Sec. 4. 24 MRSA §2502, sub-§§8 and 9 are enacted to read:

8. Professional competence review records. "Professional competence review records" means the minutes, files, notes, records, reports, statements, memoranda, data bases, proceedings,

findings and work product prepared at the request of or generated by a professional competence review committee relating to professional competence review activity. Records received or considered by a professional competence committee during professional competence review activity are not "professional competence review records" if the records are individual medical or clinical records or any other record that was created for purposes other than professional competence review activity and is available from a source other than a professional competence committee.

9. Written professional competence review process. "Written professional competence review process" means a process that is reduced to writing and includes:

A. Written criteria adopted by the health care entity that are designed to form the primary basis for granting membership, privileges or participation in or through the health care entity. The health care entity shall furnish or make available for inspection and photocopying to a requesting physician the written criteria used by the entity; and

B. A mechanism through which an individual physician can:

(1) Be informed in writing of the basis of any adverse professional competence review action;

(2) Participate in a meeting or hearing with representatives of the health care entity at which time the facts upon which an adverse action is based and the basis for the adverse action can be discussed and reconsidered; and

(3) Receive a written explanation of any final adverse professional competence review action.

Sec. 5. 24 MRSA §2506, as amended by PL 1997, c. 271, §3, is further amended to read:

§2506. Provider, entity and carrier reports

A health care provider or health care entity shall, within 60 days, report in writing to the disciplined practitioner's board or authority the name of any licensed, certified or registered employee or person privileged by the provider or entity whose employment or privileges have been revoked, suspended, limited or terminated or who resigned while under investigation or to avoid investigation for reasons related to clinical competence or unprofessional conduct, together with pertinent information relating to that action. Pertinent information includes a description of the adverse action, the

date, the location and a description of the event or events giving rise to the adverse action. Upon request, the following information must be released to the board or authority: medical records relating to the event or events; written statements signed or prepared by any witness or complainant to the event; and related correspondence between the practitioner and the provider or entity. The report must include situations in which employment or privileges have been revoked, suspended, limited or otherwise adversely affected by action of the health care practitioner while the health care practitioner was the subject of disciplinary proceedings, and it also must include situations where employment or privileges have been revoked, suspended, limited or otherwise adversely affected by act of the health care practitioner in return for the health care provider or health care entity terminating such proceeding. Any reversal, modification or change of action reported pursuant to this section must be reported immediately to the practitioner's board or authority, together with a brief statement of the reasons for that reversal, modification or change. The failure of any health care provider or health care entity to report as required is a civil violation for which a fine of not more than $1,000 may be adjudged.

Carriers providing managed care plans are subject to the reporting requirements of this section when they take adverse actions against a practitioner's credentials or employment for reasons related to clinical competence or unprofessional conduct that may adversely affect the health or welfare of the patient.

Sec. 6. 24 MRSA §2508, as enacted by PL 1977, c. 492, §3, is amended to read:

§2508. Effect of filing

The filing of a report with the board pursuant to this chapter, investigation by the board or any disposition by the board ~~shall~~ may not, in and of itself, preclude any action by a hospital or other health care facility or health care entity or professional society comprised primarily of physicians to suspend, restrict or revoke the privileges or membership of the physician.

Sec. 7. 24 MRSA §§2510-A and 2510-B are enacted to read:

§2510-A. Confidentiality of professional competence review records

Except as otherwise provided by this chapter, all professional competence review records are privileged and confidential and are not subject to discovery, subpoena or other

means of legal compulsion for their release to any person or entity and are not admissible as evidence in any civil, judicial or administrative proceeding. Information contained in professional competence review records is not admissible at trial or deposition in the form of testimony by an individual who participated in the written professional competence review process. Nothing in this section may be read to abrogate the obligations to report and provide information under section 2506, nor the application of Title 32, sections 2599 and 3296.

1. Protection; waiver. This chapter's protection may be invoked by a professional competence committee or by the subject of professional competence review activity in any civil, judicial or administrative proceeding. This section's protection may be waived only by a written waiver executed by an authorized representative of the professional competence committee.

2. Adverse professional competence review action. Subsection 1 does not apply in a proceeding in which a physician contests an adverse professional competence review action against that physician, but the discovery, use and introduction of professional competence review records in such a proceeding does not constitute a waiver of subsection 1 in any other or subsequent proceedings seeking damages for alleged professional negligence against the physician who is the subject of such professional competence review records.

3. Defense of professional competence committee. Subsection 1 does not apply in a proceeding in which a professional competence committee uses professional competence review records in its own defense, but the discovery, use and introduction of professional competence review records in such a proceeding does not constitute a waiver of subsection 1 in the same or other proceeding seeking damages for alleged professional negligence against the physician who is the subject of such professional competence review records.

4. Waiver regarding individual. Waiver of subsection 1 in a proceeding regarding one physician does not constitute a waiver of subsection 1 as to other physicians.

§2510-B. Release of professional competence review records

Nothing in this section may be read to abrogate the obligations to report and provide information under section 2506.

1. Release to other review bodies, agencies, accrediting bodies. A professional competence committee may furnish professional competence review records or information to other professional review bodies, state or federal government agencies

and national accrediting bodies without waiving any privilege against disclosure under section 2510-A.

2. Release to physician. A professional competence committee may furnish professional competence review records to the physician who is the subject of the professional competence review activity and the physician's attorneys, agents and representatives without waiving any privilege against disclosure under section 2510-A.

3. Release of directory information. A professional competence committee may furnish directory information showing membership, clinical privileges, provider panel or other practice status of a physician with the health care entity to anyone without waiving the privilege against disclosure under section 2510-A.

Sec. 8. 24 MRSA §2511, first ¶, as amended by PL 1997, c. 271, §4, is further amended to read:

Any person acting without malice, any physician, podiatrist, health care provider, health care entity or professional society, any member of a professional competence committee or professional review committee, any board or appropriate authority and any entity required to report under this chapter are immune from civil liability:'

Further amend the bill by inserting at the end before the summary the following:

'FISCAL NOTE

The additional workload and administrative costs associated with the minimal number of new cases filed in the court system can be absorbed within the budgeted resources of the Judicial Department. The collection of additional fines may increase General Fund revenue by minor amounts.'

SUMMARY

This amendment replaces the bill. It amends the Maine Health Security Act to recognize that new health care entities have arisen since the adoption of the Act. This amendment makes the Act and its obligations and protections applicable to these new types of health care entities.

New terms are included in the Health Security Act: adverse professional competence review action; health care entity;

professional competence review activity, professional competence review records, professional competence committee and written professional competence review process.

The amendment provides confidentiality for written professional competence review records. The records cannot be released except by the professional competence committee, or by the physician when the physician challenges the committee's action. If a physician uses the records to contest an adverse action, the protection is not waived for other proceedings, including actions for professional negligence. If the professional competence committee uses the records in its own defense, the protection is not waived for other proceedings, including actions for professional negligence.

A professional competence committee may release professional competence review records to other professional review bodies, state and federal agencies, accrediting bodies and the physician who is the subject of the records without waiving the protection. The committee may release directory information to anyone without waiving the protection.

The amendment also adds a fiscal note to the bill.

L.D. 546

DATE: April 14, 1997 (Filing No. S- 113)

Reproduced and distributed under the direction of the Secretary of the Senate.

STATE OF MAINE
SENATE
118TH LEGISLATURE
FIRST SPECIAL SESSION

SENATE AMENDMENT " A" to H.P. 401, L.D. 546, Bill, "An Act to Ensure Responsible Coordination of Medical Care under Managed Care"

Amend the bill by striking out all of section 1 (page 1, lines 3 to 11 in L.D.) and inserting in its place the following:

'**Sec. 1. 24-A MRSA §4303, sub-§2, ¶¶A and B,** as enacted by PL 1995, c. 673, Pt. C, §1 and affected by §2, are amended to read:

A. The granting of credentials must be based on objective standards that are available to providers upon application for credentialling. A carrier shall consult with appropriately qualified health care professionals in developing its credentialling standards.

B. All credentialling decisions ~~regarding the~~, including those granting of, denying or withdrawing credentials, ~~including a decision to deselect a provider,~~ must be in writing. The provider must be provided with all reasons for the denial of an application, ~~nonrenewal of a contract or termination of a contract~~ for credentialling or the withdrawal of credentials. A withdrawal of credentials must be treated as a provider termination and is subject to the requirements of subsection 3-A.

Sec. 2. 24-A MRSA §4303, sub-§3-A is enacted to read:

3-A. Termination of participating providers. A carrier offering a managed care plan may not terminate or nonrenew a contract with a participating provider unless the carrier

SENATE AMENDMENT

provides the provider with a written explanation prior to the termination or nonrenewal of the reasons for the proposed contract termination or nonrenewal and provides an opportunity for a review or hearing in accordance with this subsection. The existence of a termination without cause provision in a carrier's contract with a provider does not supersede the requirements of this subsection. This subsection does not apply to termination cases involving imminent harm to patient care, a final determination of fraud by a governmental agency, a final disciplinary action by a state licensing board or other governmental agency that impairs the ability of a provider to practice. A review or hearing of proposed contract termination must meet the following requirements.

A. The notice of the proposed contract termination or nonrenewal provided by the carrier to the participating provider must include:

(1) The reason or reasons for the proposed action in sufficient detail to permit the provider to respond;

(2) Reference to the evidence or documentation underlying the carrier's decision to pursue the proposed action. A carrier shall permit a provider to review this evidence and documentation upon request;

(3) Notice that the provider has the right to request a review or hearing before a panel appointed by the carrier;

(4) A time limit of not less than 30 days from the date the provider receives the notice within which a provider may request a review or hearing; and

(5) A time limit for a hearing date that must be not less than 30 days after the date of receipt of a request for a hearing.

Termination or nonrenewal may not be effective earlier than 60 days from the receipt of the notice of termination or nonrenewal.

B. A hearing panel must be composed of at least 3 persons appointed by the carrier and one person on the hearing panel must be a clinical peer in the same discipline and the same or similar specialty of the provider under review. A hearing panel may be composed of more than 3 persons if the number of clinical peers on the hearing panel constitutes 1/3 or more of the total membership of the panel.

SENATE AMENDMENT

C. A hearing panel shall render a written decision on the proposed action in a timely manner. This decision must be either the reinstatement of the provider by the carrier, the provisional reinstatement of the provider subject to conditions established by the carrier or the termination or nonrenewal of the provider.

D. A decision by a hearing panel to terminate or nonrenew a contract with a provider may not become effective less than 60 days after the receipt by the provider of the hearing panel's decision or until the termination date in the provider's contract, whichever is earlier.'

SUMMARY

This amendment replaces the bill. The amendment requires a carrier proposing to terminate a participating provider to provide a detailed explanation of the carrier's reasons for seeking to terminate the provider and the opportunity for a review or hearing on the decision at the provider's request. This requirement does not apply to termination cases involving imminent harm to patient care, a final determination of fraud by a governmental agency or a final disciplinary action that impairs the provider's ability to practice. A hearing panel of at least 3 persons, including one clinical peer of the provider, must review a proposed action to terminate a provider and provide a written decision to the provider.

SPONSORED BY: _____
(Senator LaFOUNTAIN)

COUNTY: York

SENATE AMENDMENT

COMMITTEE VOTING TALLY SHEET

LD # or Confirmation: 1728 Professional competence

Committee: Judiciary

Date: 17 April 1997

Motion: Carryover

Motion by: Rep. Kran

Seconded by: Rep. Thompson

	Those Voting in Favor of the Motion	Recommendation of those opposed to the Motion					Absent	Abstain
Senators								
1 LONGLEY	✓							
2 LAFOUNTAIN	✓							
3 BENOIT	✓							
Representatives								
1 THOMPSON	✓							
2 WATSON	✓							
3 ETNIER	✓							
4 JABAR	✓							
5 MAILHOT	✓							
6 POWERS	✓							
7 PLOWMAN	✓							
8 MADORE	✓							
9 NASS	✓							
10 WATERHOUSE	✓							
TOTALS	13							

COMMITTEE VOTING TALLY SHEET

LD # or Confirmation: 1728 Professional competence

Committee: Judiciary

Date: 23 FEBRUARY 1998

Motion: OTP-A

Motion by: Sen. LONGLEY

Seconded by: Rep. MADORE

	Those Voting in Favor of the Motion	Recommendation of those opposed to the Motion					Absent	Abstain
Senators								
1 LONGLEY	✓							
2 LAFOUNTAIN	✓							
3 BENOIT	✓							
Representatives								
1 THOMPSON	✓							
2 WATSON							✓	
3 ETNIER	✓							
4 JABAR	✓							
5 MAILHOT	✓							
6 POWERS	✓							
7 PLOWMAN	✓ dp							
8 MADORE	✓							
9 NASS	✓							
10 WATERHOUSE	✓							
TOTALS	12						1	

SENATE REPORT

THE COMMITTEE ON JUDICIARY
to which was referred the following:

An Act to Promote Professional Competence and Improve Patient Care.

S.P. 571 **L.D. 1728**

has had the same under consideration, and asks leave to report that the same

Ought to Pass as Amended by Committee Amendment " ".

Susan W Longley of Waldo

(Signature) Sen. Longley For the Committee.

(Type) (Signatures)

Rep. of (Town) and/or Sen. of (County)

SENATE REPORT

STATUTE: 24 MRSA §2604

AGENCY: Maine Bureau of Insurance

CONTACT PERSON: Ben Yardley

RETURN BY: September 30, 2022

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 22 through 24-A; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

Insurers providing professional liability insurance to persons licensed by the Board of Licensure in Medicine or the Board of Osteopathic Licensure must file reports with the Bureau when malpractice claims are filed against their insureds and upon disposition of those claims. The primary purpose of the reporting provision is to enable the Bureau to serve as an information conduit by forwarding information received to the appropriate licensing board (see 24 M.R.S. § 2605). Additionally, the Bureau may use the information in these reports to evaluate policy provisions, rate structures or the arbitration process. However, the Bureau may release or otherwise make public only data or information derived from reports that do not permit identification of the insured or insureds or the incident or occurrence for which a claim was made. To the best of our knowledge, the Bureau has not received any public records requests for the insurer reports and therefore has not used this exception in denying any records requests.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

The Bureau supports the continuation of the exception because the records contain personal health information. Were these reports considered public

records, consideration would need to be given as to how much information required in the 24 M.R.S. §§ 2601 and 2602 reports would need to be redacted because it is personally identifying information or personal health information.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

Section 2604 refers to the excepted information as "strictly confidential." This is the only time this phrase appears in Title 24, and it does not appear at all in title 24-A. We note that several sections in Title 24-A (§§ 222(13-A)(B), 423-C(4), 423-G(4)(A), 962(2), 1420-N(6), 4224(2)(A), 4245(1), 6458(1), and 6818(6)(A)) exempt records from subpoena or discovery. To the extent that "strictly" suggests a higher standard than would otherwise be the case (see 24-A M.R.S. § 216(2)), it is unclear what, if any, additional responsibilities the statute intends to place upon the Bureau. This has not presented a practical difficulty. The statute clearly describes the records it covers.

4. Does your agency recommend changes to this exception?

The Bureau does not recommend any changes to this exception.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

Board of Licensure in Medicine (Dennis Smith), Board of Osteopathic Licensure (Susan Strout), Medical Mutual Insurance Company of Maine (David Warren, Verrill Dana), Maine Medical Association (Andrew MacLean), Maine Trial Lawyers Association (Susan Faunce)

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

n/a

STATUTE: 24 MRSA §2853, sub-§1-A

AGENCY: Judicial Branch

CONTACT PERSON: Julia Finn

RETURN BY: September 30, 2022

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 22 through 24-A; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

24 MRS §2853(1-A) makes confidential the notice of claim and all other documents filed with the court in the action for professional negligence during the prelitigation screening process.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

Because this is a matter of public policy, the Judicial Branch defers to the Legislature to determine the appropriateness of this exception.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

The Judicial Branch has not encountered any problems in applying this exception.

4. Does your agency recommend changes to this exception?

No.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

Litigants and attorneys who practice in the area of professional negligence.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

STATUTE: 24 MRSA §2857, sub-§§1 and 2

AGENCY: Judicial Branch

CONTACT PERSON: Julia Finn

RETURN BY: September 30, 2022

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 22 through 24-A; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

24 MRS §2857 (1) and (2) makes confidential all proceedings before the prelitigation screening and mediation panels; and deliberations and discussions of the panels, as well as the testimony of any expert.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

Because this is a matter of public policy, the Judicial Branch defers to the Legislature to determine the appropriateness of this exception.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

The Judicial Branch has not encountered any problems in applying this exception.

4. Does your agency recommend changes to this exception?

No.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

Litigants and attorneys who practice in the area of professional negligence.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

STATUTE: 24 MRSA §2986, sub-§2

AGENCY: Bureau of Insurance (also sent to the Office of the Attorney General)

CONTACT PERSON: Ben Yardley

RETURN BY: September 30, 2022

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 22 through 24-A; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

This provision allows hospitals and health care practitioners to bill the Victim's Compensation Board for payment of forensic examinations of alleged victims of gross sexual assaults. The exception requires the hospital and practitioner to take steps necessary to ensure the confidentiality of the victim's identity in connection with their invoicing to the Board. The Bureau has no role or experience with respect to either the statute or the exception.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

The Bureau has no position with respect to this exception.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

The Bureau has no role or experience with respect to either the statute or the exception.

4. Does your agency recommend changes to this exception?
The Bureau has no position with respect to this exception.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.
The Bureau has no firsthand information with respect to this question.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.
n/a

STATUTE: 24 MRSA §2986, sub-§2

AGENCY: Office of the Attorney General (also sent to the Bureau of Insurance)

CONTACT PERSON: Jonathan Bolton

RETURN BY: September 30, 2022

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 22 through 24-A; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

This is not a public records exception but rather a regulatory requirement applicable to licensed hospitals and licensed health care practitioners that perform forensic examinations for alleged victims of sexual assault. It requires the licensed person or entity to "take steps necessary to ensure the confidentiality of the alleged victim's identity."

The OAG has no information about how frequently this statute might be applied to deny requests for information.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

The OAG supports continuation of this statutory provision. There is a strong public interest in protecting the identities of alleged crime victims, and that interest is especially heightened in the case of victims of sexual assault, who could be placed at risk if it becomes publicly known that they have reported or may report an assault to law enforcement.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

None that we are aware of. The statutory language is sufficiently clear.

4. Does your agency recommend changes to this exception?

No.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

Health care providers and hospitals; Maine Hospital Association; Maine Medical Association; victims of sexual assault.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

None.

STATUTE: 24 MRSA §2986, sub-§3

AGENCY: Judicial Branch

CONTACT PERSON: Julia Finn

RETURN BY: September 30, 2022

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 22 through 24-A; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

24 MRS §2986(3) allows for confidential court hearings in cases involving sexual assault where the victim has been unconscious for at least 60 days and a forensic examination kit ("rape kit") has been obtained by a law enforcement agency.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

Because this is a matter of public policy, the Judicial Branch defers to the Legislature to determine the appropriateness of this exception.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

The Judicial Branch has not encountered any problems in applying this exception.

4. Does your agency recommend changes to this exception?

No.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

NA

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

STATUTE: 24 MRSA §2986, sub-§3

AGENCY: Office of the Attorney General (also sent to Judicial Branch)

CONTACT PERSON: Jonathan Bolton

RETURN BY: September 30, 2022

The Right to Know Advisory Committee is established in Title 1, chapter 13 to serve as a resource for ensuring compliance with the Freedom of Access Act and upholding the integrity of the purposes underlying the Freedom of Access Act. Among its duties is to undertake review of existing provisions of law that allow records that would otherwise be public to be kept confidential. The Advisory Committee is required by law to complete a review of existing public records exceptions in Titles 22 through 24-A; the exception cited above is within the scope of that review. We would appreciate your input during this process.

Thank you.

QUESTIONS

1. Please describe your agency's experience in administering or applying this public records exception. Please include a description of the records subject to the exception, an estimate of the frequency of its application, and an estimate of how frequently the exception is cited in denying a request for production of records (whether the denial occurs in response to an FOA request or in administrative or other litigation).

This is not a public records exception but a provision relating to judicial proceedings concerning a situation in which a forensic examination is performed on an alleged sexual assault victim that is unconscious and does not regain consciousness within 60 days, which requires the court to determine what to do with the kit in absence of any decision from the alleged victim as to whether to report the assault. The provision indicates that court hearings may be conducted confidentially and the filings and records in the proceeding may be impounded.

2. Please state whether your agency supports or opposes continuation of this exception, and explain the reasons for that position.

The OAG supports continuation of this statutory provision. The proceedings described in this subsection involve sensitive matters of personal privacy, particularly because the subjects in such proceedings are unable to protect their own privacy interests.

3. Please identify any problems that have occurred in the application of this exception. Is it clear that the records described are intended to be confidential under the

FOA statutes? Is the language of the exception sufficiently clear in describing the records that are covered?

The OAG is unaware of any such problems. The statutory language is sufficiently clear.

4. Does your agency recommend changes to this exception?

No.

5. Please identify stakeholders whose input should be considered in the evaluation of this exception, with contact information if that is available.

Judicial branch; district attorneys; victims of sexual assault.

6. Please provide any further information that you believe is relevant to the Advisory Committee's review.

None.