Criminal Justice and Public Safety Committee Meeting
July 15, 2020
(Prepared July 13, 2020)

July 15, 10am
Work sessions on the following bills:

1. LD 1890, An Act to Improve Prisoner Transport Safety by Specifically Authorizing Transport of Prisoners by Transport Officers, sponsored by Rep. Farnsworth.

This bill was heard on January 1 and worked on March 4. It was scheduled for work session on March 16.

Rep. Farnsworth prepared a proposed committee amendment dated March 14, which replaces the bill and which shows in section A-10 a disagreement between Rep. Farnsworth and Jenna Mehnert of NAMI Maine regarding the required qualifications of persons who train transport officers in mental health literacy. A broadly representative group of interested parties met on July 13 and reached agreement on language that resolves the disagreement.

Copies of the bill, the proposed amendment and the new agreement are attached.

2. LD 2037, An Act to Amend the Maine Criminal Code, sponsored by Rep Warren for the Criminal Law Advisory Commission.

This bill was heard on February 28 and was scheduled for work session on March 16. At the public hearing CLAC proposed a committee amendment to correct a drafting error with regard to effective dates of amendments to the Sex Offender Registration and Notification Act of 2013 and to repeal a section of law on sexual assault on factors aiding in predicting high-risk sex offenders for sentencing purposes.

Attorney Michael Kebede, representing the ACLU, testified against the repeal of Title 17-A, section 1609 and its verbatim reenactment in section 1609, subsection 1, and offered to bring to the committee a proposed amendment to give the judge discretion in sentencing regarding concurrent or nonconcurrent sentencing.

Copies of the bill, the proposed amendment from CLAC, the letters from the Sex Offender Management and Risk Assessment Advisory Commission indicating opposition to Part E and then retracting that opposition, and the bill analysis form dated March 12 are attached.

3. LD 2139, An Act to Increase Government Accountability, sponsored by Rep. Warren.

This bill was heard on March 13 and a work session was scheduled for March 18.

Copies of the bill, the Intelligence and Investigative Record Information Act, the testimony from sponsor Representative Warren, a fact sheet from the ACLU of Maine from Megan Sway, the testimony from attorney Nathan Freed Wessler of the ACLU, the testimony from Major Christopher Grotton of the Maine State Police, and the bill analysis form dated July 13 are attached.

Troy D. Jackson
President of the Senate

State of Maine
129th Maine Legislature

Sara Gideon
Speaker of the House

July 6, 2020

Dear Fellow Legislators,

When we unanimously voted to adjourn in March to mitigate the spread of COVID-19, we did so with the goal of protecting the health and well-being of all Mainers and limiting the strain on our first responders, health care professionals and hospitals. With remarkable resilience, our people and our businesses have adapted, and as a state we are meeting that challenge.

With our accelerated timeline, we were only able to finalize legislation directly related to coronavirus response, health care, and other critical pieces of legislation deemed necessary, before our adjournment. Other unfinished matters were carried over, with the expectation of finishing our work during our next legislative session. While by no means is this crisis over, we now have proven strategies to reduce transmission giving us the ability to finalize outstanding committee work.

Please let this serve as notice that we are resuming legislative meetings on carry-over measures in July in preparation for a special session of the 129th Legislature.

We know that, throughout this crisis, you have continued to work in your districts responding to constituent concerns, as well as participating in our committee briefings focusing on the State's response. We thank you for your commitment to public service and look forward to working with you to complete the important legislative work before us.

Sincerely,

Troy Jackson

Senate President

Sara Gideon

Speaker of the House

cc: All Legislative Staff

129th MAINE LEGISLATURE

SECOND REGULAR SESSION-2020

Legislative Document **No. 1890**

H.P. 1356 House of Representatives, December 24, 2019

An Act To Improve Prisoner Transport Safety by Specifically Authorizing Transport of Prisoners by Transport Officers

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 203.

Received by the Clerk of the House on December 20, 2019. Referred to the Committee on Criminal Justice and Public Safety pursuant to Joint Rule 308.2 and ordered printed pursuant to Joint Rule 401.

Robert B. Hunt

ROBERT B. HUNT
Clerk

Presented by Representative FARNSWORTH of Portland.
Cosponsored by Senator SANBORN, H. of Cumberland and
Representatives: BRENNAN of Portland, CRAVEN of Lewiston, INGWERSEN of Arundel, KESCHL of Belgrade, McCREA of Fort Fairfield, NADEAU of Winslow, PEBWORTH of Blue Hill, Senator: CHIPMAN of Cumberland.

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

Sec. 1. 14 MRSA §5545, as amended by PL 2015, c. 335, §5, is further amended to read:

§5545. Habeas corpus for prisoner as witness

A court may issue a writ of habeas corpus, when necessary, to bring before it a prisoner for trial in a cause pending in such court, or to testify as a witness when ~~his~~ the prisoner's personal attendance is ~~deemed~~ determined necessary for the attainment of justice.

Whenever, under this section or under any other section in this chapter, a court issues a writ of habeas corpus ordering before it a prisoner confined in any penal or correctional institution under the control of the Department of Corrections, or confined in any county jail, its order as to the transportation of the prisoner to and from the court must be directed to the sheriff of the county in which the court is located. It is the responsibility of the sheriff or any one or more of the sheriff's authorized deputies or transport officers pursuant to any such order to safely transport a prisoner to and from the court and to provide safe and secure custody of the prisoner during the proceedings, as directed by the court. At the time of removal of a prisoner from an institution, the transporting officer shall leave with the head of the institution an attested copy of the order of the court, and upon return of the prisoner shall note that return on the copy.

Any prisoner who escapes from custody of the sheriff or any of ~~his~~ the sheriff's deputies, transport officers or any other law enforcement officer following removal for appearance in court, from a penal or correctional institution or from a county jail, and prior to return ~~thereto~~, ~~shall be~~ is chargeable with escape from the penal or correctional institution or county jail from which ~~he~~ the prisoner was removed, and ~~shall~~ must be punished in accordance with Title 17-A, section 755.

For purposes of this section, "transport officer" has the same meaning as in Title 25, section 2801-A, subsection 8.

SUMMARY

This bill amends the civil procedure laws governing the transporting of prisoners to specifically authorize the transport of a prisoner by transport officers when a court has issued a writ of habeas corpus requiring that prisoner to be brought before the court.

Drafter: JO
Date: March 14, 2020
Sponsor: Rep Farnsworth
File: G:\COMMITTEES\CJPS\AMENDMTS\129th 2nd\Amend LD 1890 3-14-20 With 2 Choices.Docx

Proposed Committee Amendment to LD 1890,
An Act to Improve Prisoner Transport Safety by Specifically Authorizing Transport of Prisoners by Transport Officers

Amend the bill by striking the title and inserting a new title to read: "An Act Relating to Personnel Working in Public Safety."

Amend the bill by striking everything after the title and before the summary and by inserting the following:

PART A

Sec. A-1. 14 MRSA §5545 is amended to read:

§ 5545. Habeas corpus for prisoner as witness

A court may issue a writ of habeas corpus, when necessary, to bring before it a prisoner for trial in a cause pending in such court, or to testify as a witness when ~~his~~ the prisoner's personal attendance is ~~deemed~~ determined necessary for the attainment of justice.

Whenever, under this section or under any other section in this chapter, a court issues a writ of habeas corpus ordering before it a prisoner confined in any penal or correctional institution under the control of the Department of Corrections, or confined in any county jail, its order as to the transportation of the prisoner to and from the court must be directed to the sheriff of the county in which the court is located. It is the responsibility of the sheriff or any one or more of the sheriff's authorized deputies or transport officers pursuant to any such order to safely transport a prisoner to and from the court and to provide safe and secure custody of the prisoner during the proceedings, as directed by the court. At the time of removal of a prisoner from an institution, the transporting officer shall leave with the head of the institution an attested copy of the order of the court, and upon return of the prisoner shall note that return on the copy.

Any prisoner who escapes from custody of the sheriff or any of ~~his~~ the sheriff's deputies, transport officers or any other law enforcement officer following removal for appearance in court, from a penal or correctional institution or from a county jail, and prior to return ~~thereto~~, ~~shall be~~ is chargeable with escape from the penal or correctional institution or county jail from which ~~he~~ the prisoner was removed, and ~~shall be punished~~ is subject to punishment in accordance with Title 17-A, section 755.

For purposes of this section, "transport officer" has the same meaning as in Title 25, section 2801-A, subsection 8.

Sec. A-2. 17-A MRSA section 101, subsection 5 is amended to read:

5. For the purposes of this chapter, use by a law enforcement officer, a transport officer, a corrections officer or a corrections supervisor of the following is use of nondeadly force:

A. Chemical mace or any similar substance composed of a mixture of gas and chemicals that has or is designed to have a disabling effect upon human beings; or

B. A less-than-lethal munition that has or is designed to have a disabling effect upon human beings. For purposes of this paragraph, "less-than-lethal munition" means a low-kinetic energy projectile designed to be discharged from a firearm that is approved by the Board of Trustees of the Maine Criminal Justice Academy.

Sec. A-3. 17-A MRSA section 107, subsection 5 is repealed.

Sec. A-4. 17-A MRSA section 107, subsection 5-A is repealed.

Sec. A-5. 17-A MRSA §107, subsections 5-B through 5-H are enacted to read:

5-B. A corrections officer, corrections supervisor, or correctional facility law enforcement officer or another individual responsible for the custody, care or treatment of persons in custody, pursuant to an order of a court or as a result of arrest, is justified in using a reasonable degree of nondeadly force upon another person:

A. When and to the extent the officer, the supervisor or the other individual reasonably believes it necessary to prevent an escape from custody or to enforce the rules of the facility; or

B. In self-defense or to defend a 3rd person from what the officer, the supervisor or the other individual reasonably believes to be the imminent use of unlawful nondeadly force encountered while seeking to prevent such an escape or while enforcing the rules of the facility.

5-C. A corrections officer, corrections supervisor, or correctional facility law enforcement officer responsible for a person in custody, pursuant to an order of a court or as a result of arrest, is justified in using deadly force when the officer reasonably believes such force is necessary:

A. For self-defense or to defend a 3rd person from what the officer or supervisor believes is the imminent use of unlawful deadly force; or

B. To prevent an escape from custody when the officer or supervisor reasonably believes the person has committed a crime involving the use or threatened use of deadly force, is using a dangerous weapon in attempting to escape, or otherwise indicates that the person is likely to seriously endanger human life or to inflict serious bodily injury unless apprehended without delay and:

(1) The officer or supervisor has made reasonable efforts to advise the person that the officer or supervisor is attempting to prevent the escape from custody and the

officer or supervisor has reasonable grounds to believe that the person is aware of this advice; or

(2) The officer or supervisor reasonably believes that the person in custody otherwise knows the officer or supervisor is attempting to prevent the escape from custody.

For the purposes of this paragraph, a reasonable belief that another person has committed a crime involving use or threatened use of deadly force means such reasonable belief in facts, circumstances and the law that, if true, would constitute such an offense by the person. If the facts and circumstances reasonably believed would not constitute such an offense, an erroneous but reasonable belief that the law is otherwise justifies the use of deadly force to prevent an escape.

5-D. A corrections officer, corrections supervisor or law enforcement officer is justified in using deadly force against a person confined in the Maine State Prison when the officer or supervisor reasonably believes that deadly force is necessary to prevent an escape from custody. The officer or supervisor shall make reasonable efforts to advise the person that if the attempt to escape does not stop immediately, deadly force will be used. This subsection does not authorize any corrections officer, corrections supervisor or law enforcement officer who is not employed by a state agency to use deadly force.

5-E. A private person who has been directed by a corrections officer, corrections supervisor, or correctional facility law enforcement officer responsible for a person in custody, pursuant to an order of a court or as a result of arrest, to assist the officer or supervisor in preventing an escape from custody is justified in using:

A. A reasonable degree of nondeadly force when and to the extent that the private person reasonably believes such force to be necessary to carry out the officer's or supervisor's direction, unless the private person believes the order is illegal; or

B. Deadly force only when the private person reasonably believes such force to be necessary for self-defense or to defend a 3rd person from what the private person reasonable believes to be the imminent use of unlawful deadly force, or when the officer or supervisor directs the private person to use deadly force and the private person believes the officer or supervisor is authorized to use deadly force under the circumstances.

5-F. A transport officer is justified in using a reasonable degree of nondeadly force upon another person:

A. When and to the extent the transport officer reasonably believes it is necessary to prevent the escape of a person in custody, pursuant to an order of a court or as a result of an arrest, unless the transport officer knows that the detention is illegal; or

B. In self-defense or to defend a 3rd person from what the transport officer reasonably believes to be the imminent use of unlawful nondeadly force encountered while seeking to prevent such an escape.

5-G. A transport officer is justified in using deadly force only when the transport officer reasonably believes such force is necessary:

A. For self-defense or to defend a 3rd person from what the transport officer believes is the imminent use of unlawful deadly force; or

B. To prevent the escape of a person in custody, pursuant to an order of a court or as a result of an arrest, when the transport officer reasonably believes the person has committed a crime involving the use or threatened use of deadly force, is using a dangerous weapon in attempting to escape, or otherwise indicates that the person is likely to seriously endanger human life or to inflict serious bodily injury unless apprehended without delay and:

(1) The transport officer has made reasonable efforts to advise the person that the transport officer is attempting to prevent the escape from custody and the transport officer has reasonable grounds to believe that the person is aware of this advice; or

(2) The transport officer reasonably believes that the person in custody otherwise knows the transport officer is attempting to prevent the escape from custody.

For the purposes of this paragraph, a reasonable belief that another person has committed a crime involving use or threatened use of deadly force means such reasonable belief in facts, circumstances and the law that, if true, would constitute such an offense by the person. If the facts and circumstances reasonably believed would not constitute such an offense, an erroneous but reasonable belief that the law is otherwise justifies the use of deadly force to prevent such an escape.

5-H. A private person who has been directed by a transport officer to assist the transport officer in preventing an escape from custody is justified in using:

A. A reasonable degree of nondeadly force when and to the extent that the private person reasonably believes such force to be necessary to carry out the transport officer's direction, unless the private person believes the order is illegal; or

B. Deadly force only when the private person reasonably believes such force to be necessary for self-defense or to defend a 3rd person from what the private person reasonable believes to be the imminent use of unlawful deadly force, or when the transport officer directs the private person to use deadly force and the private person believes the transport officer is authorized to use deadly force under the circumstances.

Sec. A-6. 17-A MRSA section 110 is amended to read:

§110. Threat to use deadly force against a law enforcement officer, corrections officer, corrections supervisor or transport officer

A person otherwise justified in threatening to use deadly force against another is not justified in doing so with the use of a firearm or other dangerous weapon if the person knows or should know that the other person is a law enforcement officer, corrections officer, corrections supervisor or transport officer, unless the person knows that the law enforcement officer, corrections officer, corrections supervisor or transport officer is not in fact engaged in the performance of the ~~law enforcement~~ officer's or supervisor's public duty, or unless the person is justified under this chapter in using deadly force against the ~~law enforcement~~ officer or supervisor. A law enforcement officer, corrections officer, corrections supervisor or transport officer, may not make a nonconsensual warrantless entry into a dwelling place solely in response to a threat not justified under this section.

Sec. A-7. 17-A MRSA section 1002-A, subsection 1 is amended to read:

1. A person is guilty of criminal use of a laser pointer if the person intentionally, knowingly or recklessly points a laser pointer at another person, while the laser pointer is emitting a laser beam, and:

A. Causes bodily injury to that other person. Violation of this paragraph is a Class D crime;

B. That other person is a law enforcement officer, corrections officer, corrections supervisor or transport officer in uniform. Violation of this paragraph is a Class D crime; or

C. Causes a reasonable person to suffer intimidation, annoyance or alarm. Violation of this paragraph is a Class E crime.

Sec. A-8. 17-A MRSA section 1004, subsection 4 is amended to read:

4. This section does not apply to the use of an electronic weapon by:

A. A law enforcement officer, corrections officer or corrections supervisor or a transport officer engaged in the performance of the law enforcement officer's, corrections officer's or corrections supervisor's or transport officer's public duty if the officer's or corrections supervisor's appointing authority has authorized such use of an electronic weapon; or

B. A person using an electronic weapon when that use is for the purpose of:

(1) Defending that person or a 3rd person as authorized under section 108, subsection 2; or

(2) Defending that person's dwelling place as authorized under section 104, subsections 3 and 4.

Sec. A-9. 17-A MRSA section 1058, subsection 2 is amended to read:

2. This section does not apply to:

A. A law enforcement officer, a corrections officer or a corrections supervisor or a transport officer engaged in the performance of the law enforcement officer's, corrections officer's or corrections supervisor's or transport officer's public duty;

B. A person possessing an unloaded firearm for the purpose of offering the firearm as evidence in a civil or criminal proceeding if the presiding judge or justice has granted prior approval in writing to the person and the person possesses a copy of the written approval; or

C. An employee of a courier or security service in the course and scope of employment for the courier or security service, as approved by the judicial marshal.

Sec. A-10 25 MRS 2803-A, subsection 8-C is amended to read:

8-C. Training of transport officers. To establish certification standards and a training program for transport officers. This program must include:

A. The preservice law enforcement training under section 2804-B; and

B. In-service law enforcement training that is specifically approved by the board as prescribed in section 2804-E.

Proposal from Representative Farnsworth:

The training required by this subsection must: be approved by the board; include a minimum of 8 hours of training in mental health literacy; use an evidence-based curriculum with fidelity to a mental health training model; and be instructed by at least one person who is a mental health professional. For the purposes of this subsection, "mental health professional" means a person who is a licensed clinical professional counselor, licensed clinical social worker, licensed allopathic or osteopathic physician, licensed psychologist, registered physician assistant, certified psychiatric clinical nurse specialist or certified nurse practitioner, or who has a degree that is a prerequisite to such licensure, registration, or certification.

Proposal from NAMI Maine:

The training required by this subsection must: be approved by the board; include a minimum of 8 hours of training in mental health literacy; use an evidence-based curriculum with fidelity to a mental health model, including, but not limited to, the mental health first aid or crisis intervention team program models; and be co-instructed by a certified law enforcement officer and a person holding a master's level degree in a mental health related field, including, but not limited to, a degree in social work, professional counseling, public health or psychology.

Sec. A-11. 30-A MRSA section 451, subsection 15 is enacted to read:

15. Transport officer. "Transport officer" means a person who:

A. Possesses a current and valid certification issued by the board of trustees of the Maine Criminal Justice Academy pursuant to Title 25, section 2803-A, subsection 8-C;

B. Is responsible for transferring or conveying from one place to another individuals who are confined in a jail, prison or state correctional facility pursuant to an order of a court or as the result of an arrest; and does not have general law enforcement authority outside of the scope of duty set forth herein or powers of arrest, unless the transport officer is also a certified law enforcement officer as defined by Title 25, section 2801-A, subsection 5; and

C. Who may be, but is not required to be, a law enforcement officer as defined in Title 25, section 2801-A, subsection 5, or a corrections officer as defined in Title 25, section 2801-A, subsection 2.

Sec. A-12. 30-A MRSA section 1501, subsection 4 is enacted to read:

4. Jailer and subordinates may be transport officers. The jailer and jailer's subordinate assistants and employees may be transport officers. ~~A transport officer, as defined in section 451, subsection 15, is empowered to perform prisoner transport related duties only and does not have general law enforcement authority or powers of arrest outside of the scope of duty set forth in section 451, subsection 15.~~

PART B

Sec. B-1. 20-A MRSA section 12553 is amended to read:

§12553. Tuition waiver

The child or spouse of a firefighter, ~~law enforcement officer,~~ officer or emergency medical services person as defined in Title 25, section 1611, ~~subsection 5,~~ who has been killed or who has received an injury during the performance of that firefighter's, ~~law enforcement officer's,~~ officer's or emergency medical services person's duties, which results in death, may attend, as provided in this section, any state postsecondary educational institution free of tuition charges.

1. Eligibility of a child. The child of a firefighter, ~~law enforcement officer,~~ officer or emergency medical services person is eligible for tuition waiver under this chapter if the child is:

A. The natural or legally adopted child of a firefighter, ~~law enforcement officer,~~ officer or emergency medical services person;

B. Is less than 21 years old at the time of the death of the parent who is a firefighter, ~~law enforcement officer,~~ officer or emergency medical services person;

C. A Maine resident;

D. A high school graduate or has attained equivalent certification; and

E. Accepted for admission to a state postsecondary educational institution.

1-A. Eligibility of a spouse. The spouse of a firefighter, ~~law enforcement officer,~~ officer or emergency medical services person is eligible for tuition waiver under this chapter if the spouse is:

A. Legally married to the firefighter, ~~law enforcement officer,~~ officer or emergency medical services person at the time of the firefighter's, ~~law enforcement officer's,~~ officer's or emergency medical services person's death;

B. A Maine resident;

C. A high school graduate or has attained equivalent certification; and

D. Accepted for admission to a state postsecondary educational institution.

2. Limitation. The tuition waiver provided by this chapter is limited to undergraduate degree programs and is limited to not more than 5 years of full-time enrollment or its equivalent.

3. Continuation. The tuition waiver provided by this chapter is awarded on a yearly basis and continues to be available, if the child or spouse is otherwise eligible under this section, as long as the child or spouse remains in good academic standing at a state institution.

Sec. B-2. 25 MRSA chapter 195-A title is amended to read:

CHAPTER 195-A

DEATH BENEFITS FOR ~~LAW ENFORCEMENT OFFICERS,~~ OFFICERS, FIREFIGHTERS AND EMERGENCY MEDICAL SERVICES PERSONS WHO DIE WHILE IN THE LINE OF DUTY

Sec. B-3. 25 MRSA section 1611, subsection 5 is amended to read:

5. ~~Law enforcement officer or~~ Officer. ~~"Law enforcement officer" or~~ "Officer" means an active state police officer, municipal police officer, county sheriff, deputy sheriff, game warden, an employee of the Office of the State Fire Marshal who has law enforcement powers pursuant to section 2396, subsection 7, fire marshal, judicial marshal, forest ranger, Baxter State Park ranger, a detective employed by the Office of the Attorney General pursuant to Title 5, section 202, a person employed by the Department of Corrections as a law enforcement officer, a transport officer as defined in section 2801-A, subsection 8, a corrections officer as defined in section 2801-A, subsection 2, a juvenile community corrections officer as described in Title 34-A, section 5602, a probation officer, a ~~security~~ police officer appointed by the Commissioner of Public Safety pursuant to section 2908, a motor vehicle detective or supervisor appointed by the Secretary of State pursuant to Title 29-A, section 152, a military security police officer appointed by the Adjutant General, a University of Maine System police officer or marine patrol officer in this State.

Sec. B-4. 25 MRSA section 1612, subsection 1 is amended to read:

1. Amount; recipients. In a case in which the chief determines under rules adopted pursuant to this section, that an ~~law enforcement officer or~~ officer, as defined in Title 25, section 1611, subsection 5, who has died while in the line of duty or in a case in which the State Fire Marshal determines under rules adopted pursuant to this section that a firefighter has died while in the line of duty or in a case in which the director determines under rules adopted pursuant to this section that an emergency medical services person has died while in the line of duty, the State shall pay a benefit of $50,000 as follows:

A. If there is no surviving child of the firefighter, ~~law enforcement officer,~~ officer or emergency medical services person, to the surviving spouse of the person;

B. If there is a surviving child or children and a surviving spouse of the firefighter, ~~law enforcement officer,~~ officer or emergency medical services person, 1/2 to the surviving child or children in equal shares and 1/2 to the surviving spouse;

C. If there is no surviving spouse of the firefighter, ~~law enforcement officer,~~ officer or emergency medical services person, to the child or children in equal shares; or

D. If there is no surviving child or spouse, to the parent or parents of the firefighter, ~~law enforcement officer,~~ officer or emergency medical services person in equal shares.

Sec. B-5. 25 MRSA section 1612, subsection 4 is amended to read:

4. Repayment of interim payment; waiver. If a final benefit is not paid, the recipient or recipients of any interim payment under subsection 2 are liable for repayment of the amount received. The State Fire Marshal in the case of a firefighter, the chief in the case of a ~~law enforcement officer~~ or officer or the director in the case of an emergency medical services person may waive all or part of the repayment if that official determines that undue hardship would result from that repayment.

Sec. B-6. 39-A MRSA section 328-A, subsection 1 is amended to read:

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Body fluids" means blood and body fluids containing visible blood and other potentially infectious materials, as defined in a regulation of the Occupational Safety and Health Administration, 29 Code of Federal Regulations, 1910.1030 (2001). For purposes of potential transmission of meningococcal meningitis or tuberculosis, "body fluids" includes respiratory, salivary and sinus fluids, including droplets, sputum and saliva, mucus and other fluids through which infectious airborne organisms can be transmitted between persons.

B. "Corrections officer" has the same meaning as in Title 25, section 2801-A, subsection 2.

C. "Emergency medical services person" means a person licensed as an emergency medical services person under Title 32, chapter 2-B who is employed by, or provides voluntary service to, an ambulance service as defined in Title 32, section 83 or a nontransporting emergency medical service as defined in Title 32, section 83.

D. "Emergency rescue or public safety worker" means a person who:

(1) Is a firefighter, emergency medical services person, law enforcement officer, transport officer or corrections officer; and

(2) In the course of employment, runs a high risk of occupational exposure to hepatitis, meningococcal meningitis or tuberculosis.

E. "Employer" includes an entity for which a person provides volunteer services.

F. "Firefighter" means an active member of a municipal fire department or a volunteer fire association as defined in Title 30-A, section 3151.

G. "Hepatitis" means hepatitis A, hepatitis B, hepatitis C or any other strain of hepatitis generally recognized by the medical community.

H. "High risk of occupational exposure" means a risk that is incurred because a person subject to the provisions of this section, in performing the basic duties associated with that person's employment:

(1) Provides emergency medical treatment in a nonhealth-care setting where there is a potential for the transfer of body fluids between persons;

(2) At the site of an accident, fire or other rescue or public safety operation, or in an emergency rescue or public safety vehicle, handles body fluids in or out of containers or works with or otherwise handles needles or other sharp instruments exposed to body fluids;

(3) Engages in the pursuit, apprehension and arrest of persons suspected of violating the law and, in performing such duties, risks exposure to body fluids; or

(4) Is responsible for the custody and physical restraint, when necessary, of prisoners or inmates within a prison, jail or other criminal detention facility or while on work detail outside the facility or while being transported and, in performing such a duty, risks exposure to body fluids.

I. "Law enforcement officer" has the same meaning as in Title 25, section 2801-A, subsection 5.

J. "Occupational exposure," in the case of hepatitis, meningococcal meningitis or tuberculosis, means an exposure that occurs during the performance of job duties that may place a worker at risk of infection.

K. "Transport officer" has the same meaning as in Title 25, section 2801-A, subsection 8.

SUMMARY

This amendment replaces the bill. It amends the title to read: "An Act Relating to Personnel Working in Public Safety." The amendment does the following.

Part A authorizes transport officers to transport prisoners to and from court pursuant to a writ of habeas corpus and to provide safe and secure custody of prisoners during the proceedings, as directed by the court. Part A allows a transport officer to use of a reasonable degree of nondeadly force and deadly force, based on the provisions applicable to law enforcement officers. Part A clarifies the power of corrections personnel to use force by eliminating the current statute's cross reference to law enforcement officers use of force when making arrests and using language appropriate to the corrections context. Part A extends the prohibitions on using deadly force against a law enforcement officer to corrections officers, corrections supervisors and transport officers. Part A extends the prohibitions on using laser pointers and electronic weapons against a law enforcement officer to corrections officers, corrections supervisors and transport officers. Part A extends to transport officers the exception to the prohibition on possession of a firearm in a courthouse. Part A provides a definition of transport officer in the chapter in Title 30-A Maine Revised Statutes on county officers; and empowers transport officers to perform transport related duties only, stating that a transport officer does not have general law enforcement authority outside the scope of duty of the transport officer or powers of arrest. Part A authorizes a jailer or jailer subordinate to be a transport officer. Part A also provides for private persons to assist transport and corrections officers. Part A also requires mental health literacy training for transport officers as part of the certification and training program of transport officers.

Part B adds to the definition of officer in the chapter in Title 25, Maine Revised Statutes, on death benefits for officers, firefighters and emergency medical services persons by including transport officer and corrections officer and making transport officers and corrections officers eligible for benefits. Part B provides a definition of transport officer in the workers' compensation law on communicable diseases and includes a transport officer in the definition of emergency rescue or public safety worker.

Orbeton, Jane

From: Black, Anna <Anna.Black@maine.gov>
Sent: Monday, July 13, 2020 2:40 PM
To: Orbeton, Jane
Cc: Dani Spence; Sleek, Diane E
Subject: LD 1890
Attachments: new language for transport officer training.docx

Hi Jane-

Attached is new language for section 8-C of LD 1890. The attached language has consensus from the following: DOC, ME Sheriffs (Cumberland County), NAMI, DPS, Rep. Farnsworth.

Below is a list of participants who worked through the language this morning and came to the attached consensus.

- Dani Spence
- Jenna Menhert
- Cory Swope
- Rick Desjardins
- Diane Sleek
- Sheriff Joyce
- Rep. Farnsworth
- Commissioner Liberty
- Bob Reed (NAMI board member)
- Myself

Let me know if you have any questions.

Senator Deschambault and I have briefly chatted about this.

Thanks, Anna

Anna Black, Director of Government Affairs

Amend Title 25, section 2803-A, subsection 8-C as follows:

8-C. Training of transport officers. To establish certification standards and a training program for transport officers. This program must include:

A. The preservice law enforcement training under section 2804-B; ~~and~~

B. In-service law enforcement training that is specifically approved by the board as prescribed in section 2804-E; and

C. Either as part of one of the above or as part of another board-approved training, a minimum of eight hours of mental health first aid training meeting the following requirements:

(1) Co-instructed by a current or former certified law enforcement officer or corrections officer and a mental health professional;

(a) "Mental health professional" means a person who is a licensed clinical professional counselor, licensed clinical social worker, licensed allopathic or osteopathic physician, licensed psychologist, registered physician assistant, certified psychiatric clinical nurse specialist or certified nurse practitioner, or who has a degree that is a prerequisite to such licensure, registration, or certification.

(2) Using an evidence-based curriculum with fidelity to that mental health first aid training model; and

(3) Approved by the board;

129th MAINE LEGISLATURE

SECOND REGULAR SESSION-2020

Legislative Document **No. 2037**

H.P. 1447 House of Representatives, January 14, 2020

An Act To Amend the Maine Criminal Code

Reported by Representative WARREN of Hallowell for the Criminal Law Advisory Commission pursuant to the Maine Revised Statutes, Title 17-A, section 1354, subsection 2.

Reference to the Committee on Criminal Justice and Public Safety suggested and ordered printed pursuant to Joint Rule 218.

Robert B. Hunt

ROBERT B. HUNT
Clerk

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

PART A

Sec. A-1. 17-A MRSA §1609, as enacted by PL 2019, c. 113, Pt. A, §2, is repealed and the following enacted in its place:

§1609. Nonconcurrent sentence

1. Mandatory nonconcurrent sentence. Notwithstanding section 1608, when an individual subject to an undischarged term of imprisonment is convicted of a crime committed while in execution of any term of imprisonment, the sentence is not concurrent with any undischarged term of imprisonment. The court may order that any undischarged term of imprisonment be tolled and service of the nonconcurrent sentence commence immediately and the court shall so order if any undischarged term of imprisonment is a split sentence. No portion of the nonconcurrent sentence may be suspended. Any sentence that the convicted individual receives as a result of the conviction of a crime while in execution of a term of imprisonment must be nonconcurrent with all other sentences.

This subsection also applies to prisoners on supervised community confinement pursuant to Title 34-A, section 3036-A.

2. Discretionary nonconcurrent sentence. Notwithstanding section 1608, when an individual subject to an undischarged term of imprisonment is convicted of a crime committed during a stay of execution of any term of imprisonment, convicted of a crime committed after failure to report after a stay of execution of any term of imprisonment or convicted of failure to report as ordered after a stay of execution of any term of imprisonment, the court may order that the sentence is not concurrent with any undischarged term of imprisonment. If the court orders that the sentence is not concurrent, the court may order that any undischarged term of imprisonment be tolled and service of the nonconcurrent sentence commence immediately, and the court shall so order if any undischarged term of imprisonment is a split sentence. No portion of the nonconcurrent sentence may be suspended. Any nonconcurrent sentence that the convicted individual receives as a result of an order entered pursuant to this subsection must be nonconcurrent with all other sentences.

PART B

Sec. B-1. 17-A MRSA §2016, sub-§1, as enacted by PL 2019, c. 113, Pt. A, §2, is amended to read:

1. Work program; payment of restitution and fines. A prisoner who has been ordered to pay restitution or fines may not be released pursuant to a work program administered by the Department of Corrections under Title 34-A, section 3035, or a sheriff under Title 30-A, section 1605, or participate in an industry program under Title 34-A, section 1403, subsection 9 or any other program administered by the Department of Corrections or a sheriff by which a prisoner is able to generate money, unless the prisoner consents to pay at least 25% of the prisoner's gross weekly wages or other money generated to the victim or the court until such time as full restitution has been made or the

fine is paid in full. The chief administrative officer of the correctional facility where the prisoner is incarcerated shall collect and disburse to the victim or victims that portion of the prisoner's wages or other money generated agreed to as payment of restitution. The chief administrative officer of the correctional facility where the prisoner is incarcerated shall also collect and disburse to the court that portion of the prisoner's wages or other money generated agreed to as payment of fines after the restitution is paid in full. If the victim or victims ordered by the court to receive restitution cannot be located, the correctional facility shall ~~inform the court that ordered restitution. The court shall determine the distribution of these funds~~ forward the funds, as provided in section 2009, to the Treasurer of State to be handled as unclaimed property.

Sec. B-2. 17-A MRSA §2016, sub-§2, as enacted by PL 2019, c. 113, Pt. A, §2, is amended to read:

2. Payment of restitution or fines from other sources. A prisoner, other than one addressed by subsection 1, who receives money, from any source, shall pay 25% of that money to any victim or the court if the court has ordered that restitution or a fine be paid. The chief administrative officer of the correctional facility in which the prisoner is incarcerated shall collect and disburse to the victim or victims that portion of the prisoner's money ordered as restitution. The chief administrative officer of the correctional facility where the prisoner is incarcerated shall also collect and disburse to the court that portion of the prisoner's money ordered as fines after the restitution is paid in full. If the victim or victims ordered by the court to receive restitution cannot be located, the correctional facility shall ~~inform the court that ordered restitution. The court shall determine the distribution of these funds~~ forward the funds, as provided in section 2009, to the Treasurer of State to be handled as unclaimed property. Money received by the prisoner and directly deposited into a telephone call account established by the Department of Corrections for the sole purpose of paying for use of the department's client telephone system is not subject to this subsection, except that 25% of any money received by the prisoner and transferred from the telephone call account to the department's general client account at the time of the prisoner's discharge or transfer to supervised community confinement must be collected and disbursed as provided in this subsection.

PART C

Sec. C-1. 17-A MRSA §301, sub-§1, ¶A, as amended by PL 2001, c. 383, §26 and affected by §156, is further amended to read:

A. The actor knowingly restrains another person with the intent to:

(1) Hold the other person for ransom or reward;

(2) Use the other person as a shield or hostage;

(3) Inflict bodily injury upon the other person ~~or subject the other person to conduct defined as criminal in chapter 11~~;

(3-A) Subject the other person to conduct defined as criminal in chapter 11;

(4) Terrorize the other person or a 3rd person;

(5) Facilitate the commission of another crime by any person or flight thereafter; or

(6) Interfere with the performance of any governmental or political function; or

Sec. C-2. 34-A MRSA §11203, sub-§6, ¶B, as repealed and replaced by PL 2013, c. 424, Pt. A, §19, is amended to read:

B. A violation under former Title 17, section 2922; former Title 17, section 2923; former Title 17, section 2924; Title 17-A, section 253, subsection 2, paragraph E, F, G, H, I or J; Title 17-A, section 254; former Title 17-A, section 255, subsection 1, paragraph A, E, F, G, I or J; former Title 17-A, section 255, subsection 1, paragraph B or D if the crime was not elevated a class under former Title 17-A, section 255, subsection 3; Title 17-A, section 255-A, subsection 1, paragraph A, B, C, F-2, G, I, J, K, L, M, N, Q, R, S or T; Title 17-A, section 256; Title 17-A, section 258; former Title 17-A, section 259; Title 17-A, section 282; Title 17-A, section 283; Title 17-A, section 284; Title 17-A, section 301, subsection 1, paragraph A, subparagraph ~~(3)~~ (3-A), unless the actor is a parent of the victim; Title 17-A, section 511, subsection 1, paragraph D; Title 17-A, section 556; Title 17-A, section 852, subsection 1, paragraph B; or Title 17-A, section 855;

Sec. C-3. 34-A MRSA §11273, sub-§16, ¶C, as enacted by PL 2011, c. 663, §3, is amended to read:

C. Title 17-A, section 301, subsection 1, paragraph A, subparagraph ~~(3)~~ (3-A);

Sec. C-4. 37-B MRSA §504, sub-§4, ¶H, as enacted by PL 2015, c. 175, §1, is amended by amending subparagraph (3) to read:

(3) Been convicted of a Class A or Class B crime under:

(a) Title 17-A, chapter 11;

(b) Title 17-A, chapter 12; or

(c) Title 17-A, section 301, subsection 1, paragraph A, subparagraph ~~(3)~~ (3-A);

PART D

Sec. D-1. 17-A MRSA §1111-B, as amended by PL 2019, c. 292, §1, is further amended to read:

§1111-B. Exemption from criminal liability for reporting a drug-related medical emergency or administering naloxone

A person who in good faith seeks medical assistance for or administers naloxone hydrochloride to another person experiencing a drug-related overdose or who is experiencing a drug-related overdose and is in need of medical assistance may not be arrested ~~or~~, prosecuted ~~for~~ or subject to revocation of probation based on conduct that would otherwise constitute a violation of section 1107-A, 1108, 1111 or 1111-A ~~or a violation of probation as authorized by chapter 49~~ if the grounds for arrest or prosecution

are obtained as a result of the person's seeking medical assistance, administering naloxone hydrochloride or experiencing a drug-related overdose.

SUMMARY

This bill is submitted by the Criminal Law Advisory Commission pursuant to the Maine Revised Statutes, Title 17-A, section 1354, subsection 2.

Part A of the bill authorizes nonconcurrent sentencing when a crime is committed by a convicted person during a stay of execution of any term of imprisonment or after failure to report after a stay of execution of any term of imprisonment. It also authorizes nonconcurrent sentencing when the convicted person is convicted of the crime of failure to report as ordered after a stay of execution of any term of imprisonment.

Part B amends Title 17-A, section 2016 to make it consistent with existing law in Title 17-A, section 2009 with respect to disposition of funds by correctional facilities when they hold funds for the purposes of restitution and the victim cannot be located. Current Title 17-A, section 2016 requires the facility to notify the court and the court to determine distribution of the funds. The bill requires the facility to forward the funds to the Treasurer of State to be handled as unclaimed property, consistent with current Title 17-A, section 2009.

Part C separates 2 variants of kidnapping under Title 17-A, section 301, subsection 1, paragraph A, subparagraph (3). The crime of kidnapping with the intent to inflict bodily injury is distinct from the crime of kidnapping with the intent to subject a person to criminal activity defined in Title 17-A, chapter 11. The latter remains a Tier III crime requiring registration pursuant to the Sex Offender Registration and Notification Act of 2013. Crimes committed in violation of Title 17-A, section 301, subsection 1, paragraph A, subparagraph (3) after the effective date of this legislation will not require registration. In addition, this provision provides clarity in the Maine Criminal Code and a more accurate reference for purposes of crime data.

Part D clarifies that immunity from revocation of probation is limited to the same conduct for which there is immunity from prosecution under the law protecting persons seeking medical assistance or administering naloxone hydrochloride or experiencing a drug-related overdose.

Drafter: JO
Date: February 27, 2020
File: G:\COMMITTEES\CJPS\AMENDMTS\129th 2nd\Amend 2037 2020.Docx

Proposed Committee amendment to LD 2037, An Act To Amend the Maine Criminal Code

Proposal from the Criminal Law Advisory Commission

Amend the bill by deleting sections C-2, C-3 and C-4 and by inserting the following:

Sec. C-2. 34-A MRSA §11273, sub-§16, ¶C, as enacted by PL 2011, c. 663, §3, is amended to read:

C. Title 17-A, section 301, subsection 1, paragraph A, subparagraph (3) if the crime is committed prior to October 1, 2020;

Sec. C-3. 34-A MRSA §11273, sub-§16, ¶C-1 is enacted to read:

C-1. Title 17-A, section 301, subsection 1, paragraph A, subparagraph 3-A if the crime is committed on or after October 1, 2020;

Sec. C-4. 37-B MRSA §504, sub-§4, ¶H, as enacted by PL 2015, c. 175, §1, is amended by amending subparagraph (3) to read:

H. A person is not eligible for interment under this chapter if the person has:

(1) Been convicted of the crime of murder;

(2) Been convicted of a crime in another jurisdiction punishable by a sentence of life imprisonment or death;

(3) Been convicted of a Class A or Class B crime under:

(a) Title 17-A, chapter 11;

(b) Title 17-A, chapter 12; ~~or~~

(c) Title 17-A, section 301, subsection 1, paragraph A, subparagraph (3) if the crime is committed prior to October 1, 2020;

(d) Title 17-A, section 301, subsection 1, paragraph A, subparagraph (3-A) if the crime is committed on or after October 1, 2020;

(4) Been convicted of a Class C crime under Title 17-A, section 853, subsection 1;

(5) Been convicted of a military, tribal or federal offense requiring registration pursuant to the federal Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248, 42 United States Code, Chapter 151;

(6) Been convicted under any other jurisdiction's sex offender laws requiring the person to register for life; or

(7) Been found to have committed any crime listed in subparagraphs (1) to (6) but has not been convicted because the person has not been available for trial due to the person's death or flight to avoid prosecution. A finding under this subparagraph must be made by the appropriate federal official. Any such finding may be based only upon a showing of clear and convincing evidence, after an opportunity for a hearing in a manner prescribed by the appropriate federal official. For purposes of this subparagraph, "appropriate federal official" means the Secretary of Veterans Affairs, in the case of the National Cemetery Administration, or the Secretary of the Army, in the case of the Arlington National Cemetery.

Sec. C-5. Effective date. This Part takes effect October 1, 2020.

Amend the bill by adding a new Part E to read:

PART E

Sec. E-1. 17-A MRSA §257 is repealed.

SUMMARY

The amendment removes from the bill a proposed amendment to the Sex Offender Registration and Notification Act of 1999 that was included in the bill in error. The amendment separates 2 variants of kidnapping under Title 17-A, section 301, subsection 1, paragraph A, subparagraph (3). The amendment clarifies that the amendments to the Sex Offender Registration and Notification Act of 2013 apply to a crime committed prior to October 1, 2020, if the offense is knowingly restraining another person with the intent to inflict bodily injury, and apply to a crime committed on or after October 1, 2020, if the crime is a crime under Title 17-A chapter 11. The amendment provides an effective date of October 1, 2020, for Part C.

The amendment repeals a section of law in chapter 11 on sexual assault on factors aiding in predicting high-risk sex offenders for sentencing purposes, leaving individual risk assessment at sentencing to the judgment of the court.

STATE OF MAINE
SEX OFFENDER MANAGEMENT AND RISK
ASSESSMENT ADVISORY COMMISSION

February 27, 2020

Re: LD 2037 - An Act to Amend the Maine Criminal Code

Senator Deschambault, Representative Warren and members of the Committee on Criminal Justice and Public Safety:

The Sex Offender Management and Risk Assessment Advisory Commission ("Commission") submits the following testimony regarding LD 2037 - An Act to Amend the Maine Criminal Code:

Part C; Section C-1 – The Commission is in favor of this amendment to the Kidnapping statute to clarify what specific conduct would require registration pursuant to SORNA. The Commission further believes that Chapter 12 offenses should also be included in sub-section 3-A, but, if necessary, will address the issue in a future session.

Part D; Section D-1 – The Commission is in favor of this amendment which extends immunity to probation violations only for drug related offenses and does not apply to sex offenses evidence of which is discovered during a drug-overdose related emergency.

Part E (committee amendment) – Although the Commission has not formally voted on this measure, through correspondence with Commission members, I am confident that the Commission would oppose repeal of 17-A M.R.S. §257 at this time, without the opportunity to fully analyze the statute and its implications.

Other than the above, the Commission takes no position on the remaining provisions of the bill.

Kent Avery
Chair, Sex Offender Management and Risk Assessment Advisory Commission

STATE OF MAINE
SEX OFFENDER MANAGEMENT AND RISK
ASSESSMENT ADVISORY COMMISSION

March 11, 2020

Re: LD 2037 - An Act to Amend the Maine Criminal Code – **Supplemental Testimony**

Senator Deschambault, Representative Warren and members of the Committee on Criminal Justice and Public Safety:

The Sex Offender Management and Risk Assessment Advisory Commission ("Commission") submits the following supplemental testimony regarding LD 2037 - An Act to Amend the Maine Criminal Code:

Part E (committee amendment) – After further deliberation, the Commission has voted in favor of repeal 17-A M.R.S. §257 as contained in LD 2037.

This testimony supersedes the Commission's written testimony dated February 27, 2020 as pertains to Part E (committee amendment) only. The remining provisions of the commission's February 27, 2020 testimony remains unchanged.

Kent Avery
Chair, Sex Offender Management and Risk Assessment Advisory Commission

OFFICE OF POLICY AND LEGAL ANALYSIS
BILL ANALYSIS

TO: **Members, Joint Standing Committee on Criminal Justice and Public Safety**

FROM: **Jane Orbeton, Legislative Analyst**

DATE: **March 12, 2020**

LD: **2037, "An Act To Amend the Maine Criminal Code" (Criminal Law Advisory Committee, pursuant to Title 17-A, section 1354, subsection 2)**

SUMMARY:

This bill was submitted by the Criminal Law Advisory Commission.

Section A-1, in Title 17-A, section 1609, subsection 1 is a repeal and reenactment of current law in section 1609. Repeal and reenactment is included in the bill because section 1609 does not have subsection numbers and because a new subsection 2 is proposed.

Section A-1, in Title 17-A, section 1609, subsection 2, authorizes nonconcurrent sentencing as follows:

1. When a crime is committed by a convicted person during a stay of execution of any term of imprisonment;
2. After failure to report after a stay of execution of any term of imprisonment; and
3. When the convicted person is convicted of the crime of failure to report as ordered after a stay of execution of any term of imprisonment.

Part B-1 and B-2 amend the law with regard to unclaimed restitution funds so that when they are held by a correctional facility they are handled the same as unclaimed property held by other entities. Current law requires a correctional facility that has collected restitution funds pursuant to a court order to go back to the court when the victim cannot be found. Part B provides that the unclaimed funds be sent to the Treasurer of State to be handled as unclaimed property.

Part C-1 through C-4 (as amended by the February 27 proposed amendment from CLAC) separate 2 variants of kidnapping under Title 17-A, section 301, subsection 1, paragraph A, subparagraph (3). Variants of a crime should be listed in the law separately for the purposes of arrest and court records. This can be done by dividing subparagraph 3 so that it applies only to kidnapping with the intent to inflict bodily injury and by enacting the new subparagraph 3-A that applies to kidnapping with the intent to commit a sexual assault. This is section C-1. Sections C-2 through C-4 correct the sex offender registration laws so that the person convicted of kidnapping will be required to register only if the offense involves the intent to commit a sexual assault under new subparagraph 3-A.

Part D amends the law that protecting persons seeking medical assistance or administering naloxone hydrochloride or experiencing a drug-related overdose from prosecution. The law provides immunity from arrest and prosecution for drug possession, acquiring drugs by deception, possession of hypodermic apparatuses and use of drug paraphernalia. It also provides immunity from prosecution for probation violation. Part D proposes to limit the immunity from revocation of probation to the same 4 crimes as listed in immunity from arrest and prosecution.

Part E, proposed in an amendment from CLAC dated February 27, repeals Title 17-A, section 257, on factors aiding in predicting high-risk sex offenders for sentencing purposes.

ISSUES FROM PUBLIC HEARING:

1. Michael Kebede, of the ACLU of Maine, opposed current law in section A-1 on mandatory nonconcurrent sentences (Title 17-A, section 1609, subsection 1) and supported the proposed new law in the same section of the bill (Title 17-A, section 1609, subsection 2). Mr. Kebede offered to bring a proposed amendment to section A-1 of the bill to give the judge discretion in sentencing. ACLU supports the bill other than Part A.
2. Kent Avery, Assistant Attorney General, submitted testimony on behalf of the Sex Offender Management and Risk Assessment Advisory Commission supporting the bill in general and opposing section E-1. Assistant Attorney General Kent Avery submitted a letter dated March 11 from the advisory Commission supporting section E-1 and withdrawing their objection.
3. The Maine Association of Criminal Defense Lawyers submitted a letter from Walter McKee, indicating that they support the bill, especially Parts C and D.

FISCAL IMPACT:

No fiscal information available at this time.

129th MAINE LEGISLATURE

SECOND REGULAR SESSION-2020

Legislative Document **No. 2139**

H.P. 1527 House of Representatives, March 5, 2020

An Act To Increase Government Accountability

(AFTER DEADLINE)

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 205.

Reference to the Committee on Criminal Justice and Public Safety suggested and ordered printed.

Robert B. Hunt

ROBERT B. HUNT
Clerk

Presented by Representative WARREN of Hallowell.
Cosponsored by Senator BELLOWS of Kennebec and
Representatives: ANDREWS of Paris, BEEBE-CENTER of Rockland, Speaker GIDEON of Freeport, Senators: DESCHAMBAULT of York, GUERIN of Penobscot, President JACKSON of Aroostook.

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

Sec. 1. 16 MRSA §807, as amended by PL 2013, c. 507, §8, is repealed.

SUMMARY

This bill repeals the provision of law that prohibits a Maine criminal justice agency from confirming the existence or nonexistence of confidential intelligence and investigative record information to any person or public or private entity that is not eligible to receive the information itself.

CHAPTER 9

INTELLIGENCE AND INVESTIGATIVE RECORD INFORMATION ACT

§801. Short title

This chapter may be known and cited as "the Intelligence and Investigative Record Information Act."

§802. Application

This chapter applies to a record that is or contains intelligence and investigative record information and that is collected by or prepared at the direction of or kept in the custody of any Maine criminal justice agency.

§803. Definitions

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

1. Administration of civil justice. "Administration of civil justice" means activities relating to the anticipation, prevention, detection, monitoring or investigation of known, suspected or possible civil violations and prospective and pending civil actions. It includes the collection, storage and dissemination of intelligence and investigative record information relating to the administration of civil justice. "Administration of civil justice" does not include known, suspected or possible traffic infractions.

2. Administration of criminal justice. "Administration of criminal justice" means activities relating to the anticipation, prevention, detection, monitoring or investigation of known, suspected or possible crimes. It includes the collection, storage and dissemination of intelligence and investigative record information relating to the administration of criminal justice.

3. Administration of juvenile justice. "Administration of juvenile justice" means activities relating to the anticipation, prevention, detection, monitoring or investigation of known, suspected or possible juvenile crimes. "Administration of juvenile justice" includes the collection, storage and dissemination of intelligence and investigative information relating to the administration of juvenile justice.

4. Criminal justice agency. "Criminal justice agency" means a federal, state or State of Maine government agency or any subunit of a government agency at any governmental level that performs the administration of criminal justice pursuant to a statute or executive order. "Criminal justice agency" includes the Department of the Attorney General, district attorneys' offices and the equivalent departments or offices in any federal or state jurisdiction. "Criminal justice agency" also includes any equivalent agency at any level of Canadian government and the government of any federally recognized Indian tribe.

5. Dissemination. "Dissemination" means the transmission of information by any means, including but not limited to orally, in writing or electronically, by or to anyone outside the criminal justice agency that maintains the information.

6. Executive order. "Executive order" means an order of the President of the United States or the chief executive of a state that has the force of law and that is published in a manner permitting regular public access.

7. Intelligence and investigative record information. "Intelligence and investigative record information" means information of record collected by or prepared by or at the direction of a criminal justice agency or kept in the custody of a criminal justice agency while performing the administration of criminal justice or, exclusively for the Department of the Attorney General and district attorneys'

offices, the administration of civil justice. "Intelligence and investigative record information" includes information of record concerning investigative techniques and procedures and security plans and procedures prepared or collected by a criminal justice agency or other agency. "Intelligence and investigative record information" does not include criminal history record information as defined in section 703, subsection 3 and does not include information of record collected or kept while performing the administration of juvenile justice.

8. State. "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, Guam and American Samoa. "State" also includes the federal government of Canada and any provincial government of Canada and the government of any federally recognized Indian tribe.

9. Statute. "Statute" means an Act of Congress or an act of a state legislature or a provision of the Constitution of the United States or the constitution of a state.

§804. Limitation on dissemination of intelligence and investigative record information

Except as provided in sections 805 and 806, a record that is or contains intelligence and investigative record information is confidential and may not be disseminated by a Maine criminal justice agency to any person or public or private entity if there is a reasonable possibility that public release or inspection of the record would:

1. Interfere with criminal law enforcement proceedings. Interfere with law enforcement proceedings relating to crimes;

2. Result in dissemination of prejudicial information. Result in public dissemination of prejudicial information concerning an accused person or concerning the prosecution's evidence that will interfere with the ability of a court to impanel an impartial jury;

3. Constitute an invasion of privacy. Constitute an unwarranted invasion of personal privacy;

4. Disclose confidential source. Disclose the identity of a confidential source;

5. Disclose confidential information. Disclose confidential information furnished only by a confidential source;

6. Disclose trade secrets or other confidential commercial or financial information. Disclose trade secrets or other confidential commercial or financial information designated as such by the owner or source of the information, by the Department of the Attorney General or by a district attorney's office;

7. Disclose investigative techniques or security plans. Disclose investigative techniques and procedures or security plans and procedures not known by the general public;

8. Endanger law enforcement or others. Endanger the life or physical safety of any individual, including law enforcement personnel;

9. Disclose statutorily designated confidential information. Disclose information designated confidential by statute;

10. Interfere with civil proceedings. Interfere with proceedings relating to civil violations, civil enforcement proceedings and other civil proceedings conducted by the Department of the Attorney General or by a district attorney's office;

11. Disclose arbitration or mediation information. Disclose conduct of or statements made or documents submitted by any person in the course of any mediation or arbitration conducted under the auspices of the Department of the Attorney General; or

12. Identify source of consumer or antitrust complaints. Identify the source of a complaint

made to the Department of the Attorney General regarding a violation of consumer or antitrust laws.

§805. Exceptions

This chapter does not preclude dissemination of intelligence and investigative record information that is confidential under section 804 by a Maine criminal justice agency to:

1. Another criminal justice agency. Another criminal justice agency;

2. A person or entity for purposes of intelligence gathering or ongoing investigation. A person or public or private entity as part of the criminal justice agency's administration of criminal justice or the administration of civil justice by the Department of the Attorney General or a district attorney's office;

3. An accused person or that person's agent or attorney. A person accused of a crime or that person's agent or attorney for trial and sentencing purposes if authorized by:

A. The responsible prosecutorial office or prosecutor; or

B. A court rule, court order or court decision of this State or of the United States.

As used in this subsection, "agent" means a licensed professional investigator, an expert witness or a parent, foster parent or guardian if the accused person has not attained 18 years of age;

4. Court. A federal court, the District Court, Superior Court or Supreme Judicial Court or an equivalent court in another state;

5. An authorized person or entity. A person or public or private entity expressly authorized to receive the intelligence and investigative record information by statute, executive order, court rule, court decision or court order. "Express authorization" means language in the statute, executive order, court rule, court decision or court order that specifically speaks of intelligence and investigative record information or specifically refers to a type of intelligence or investigative record; or

6. Secretary of State. The Secretary of State for use in the determination and issuance of a driver's license suspension.

§806. Exceptions subject to reasonable limitations

Subject to reasonable limitations imposed by a Maine criminal justice agency to protect against the harms described in section 804, this chapter does not preclude dissemination of intelligence and investigative record information confidential under section 804 by a Maine criminal justice agency to:

1. A government agency responsible for investigating child or adult abuse, neglect or exploitation or regulating facilities and programs providing care to children or adults. A government agency or subunit of a government agency in this State or another state that pursuant to statute is responsible for investigating abuse, neglect or exploitation of children or incapacitated or dependent adults or for licensing or regulating the programs or facilities that provide care to children or incapacitated or dependent adults if the intelligence and investigative record information concerns the investigation of suspected abuse, neglect or exploitation;

2. A crime victim or that victim's agent or attorney. A crime victim or that victim's agent or attorney. As used in this subsection, "agent" means a licensed professional investigator, an insurer or an immediate family member, foster parent or guardian if due to death, age or physical or mental disease, disorder or defect the victim cannot realistically act on the victim's own behalf; or

3. A counselor or advocate.

4. A counselor or advocate. A sexual assault counselor, as defined in section 53-A, subsection 1, paragraph B, or an advocate, as defined in section 53-B, subsection 1, paragraph A. A person to whom intelligence and investigative record information is disclosed pursuant to this subsection:

A. May use the information only for planning for the safety of the victim of a sexual assault or

domestic or family violence incident to which the information relates;

B. May not further disseminate the information;

C. Shall ensure that physical copies of the information are securely stored and remain confidential;

D. Shall destroy all physical copies of the information within 30 days after their receipt;

E. Shall permit criminal justice agencies providing such information to perform reasonable and appropriate audits to ensure that all physical copies of information obtained pursuant to this subsection are maintained in accordance with this subsection; and

F. Shall indemnify and hold harmless criminal justice agencies providing information pursuant to this subsection with respect to any litigation that may result from the provision of the information to the person.

§807. Confirming existence or nonexistence of confidential intelligence and investigative record information

A Maine criminal justice agency may not confirm the existence or nonexistence of intelligence and investigative record information confidential under section 804 to any person or public or private entity that is not eligible to receive the information itself.

§808. No right to access or review

A person who is the subject of intelligence and investigative record information maintained by a criminal justice agency has no right to inspect or review that information for accuracy or completeness.

§809. Unlawful dissemination of confidential intelligence and investigative record information

1. Offense. A person is guilty of unlawful dissemination of confidential intelligence and investigative record information if the person intentionally disseminates intelligence and investigative record information confidential under section 804 knowing it to be in violation of any of the provisions of this chapter.

2. Classification. Unlawful dissemination of confidential intelligence and investigative record information is a Class E crime.

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HOUSE OF REPRESENTATIVES
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March 13, 2020

Testimony of Rep. Charlotte Warren presenting
LD 2139, An Act To Increase Government Accountability
Before the Joint Standing Committee on Criminal Justice and Public Safety

Senator Deschambault, and distinguished colleagues of the Committee on Criminal Justice and Public Safety, good morning. I am Representative Charlotte Warren, and I represent the towns of West Gardiner and Manchester and my home city of Hallowell. Thank you for the opportunity to present LD 2139, An Act To Increase Government Accountability. This legislation is both necessary and overdue. For several years now, Maine has been *the only* state with an existing law that shrouds government processes in secrecy.[1]

The bill I am presenting to you today seeks to repeal a law which says that when a person makes a request to a Maine criminal justice agency under the Freedom of Access Act for certain kinds of records, the agency must refuse to confirm the existence or nonexistence of records if any of the underlying documents are themselves exempt from disclosure. Again, they must, there is no discretion on the part of the agency. Most alarming, when read together with other parts of the statute, Section 807, requires a law enforcement agency to not disclose when asked about its use of a surveillance method that is not yet known to the public.

The Press Herald recently reported that during the Cold War, the refusal to confirm or deny the existence of records became known as a "Glomar response."[2] A Glomar response might have been appropriate to shield national security secrets in the 1970s and 80s. But Maine's blanket law now goes too far. Requiring law enforcement to neither confirm nor deny the existence or nonexistence of facial recognition technology, or methods to track our cellphones, threatens the very core of our democracy. We cannot control, or debate, or assess, or reject what we don't know. You, as members of the Criminal Justice and Public Safety committee, because of this existing law cannot provide proper oversight of new

[1] A few weeks ago, the Press Herald reported only Maine and Indiana have such a law. But Indiana's law is so much better than Maine's that it is fair to say Maine stands alone. Maine's law imposes a mandatory Glomar response, where Indiana's gives agencies discretion; and Indiana's law permits a Glomar response only when the fact of the existence or nonexistence of records would itself reveal confidential information and cause harm. Maine, in contrast, requires a Glomar response whenever any of the underlying records themselves could be withheld, but requires no showing that merely confirming or denying the existence of records would, by itself, cause harm. *See* Randy Billings, *Maine State Police may be spying on you*, Portland Press Herald, (Feb. 10, 2020), https://www.pressherald.com/2020/02/09/maine-state-police-may-be-spying-on-you/

[2] Ibid.

and emerging technologies. Mainers deserve better. Further, I suspect that most Mainers assume we are doing better.

When the Portland Press Herald article was printed a few weeks ago bringing this issue to our collective attention, Senator Bellows and I received an email from our shared constituent asking us to fix this issue. He was rightly outraged.

Repealing Section 807 will not impact law enforcement agencies' ability to properly withhold sensitive documents from release, if permitted to do so by Title 16 or other provisions of Maine law. There may very well be circumstances where law enforcement agencies are still justified in issuing a narrow Glomar response. The federal Freedom of Information Act lacks a Glomar provision, but federal courts have ruled that in narrow circumstances, where confirming or denying the existence of records on a particular topic would itself cause harm (such as revealing the identity of a confidential source), agencies may issue a Glomar response. Courts in New York and New Jersey have done the same. Maine courts would likely interpret existing laws similarly after repeal of Section 807.

Mainers deserve transparent government. I look forward to working with you all on this important piece of legislation. Thank you and I am happy to answer any questions.

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Fact Sheet: LD 2139, "An Act To Increase Government Accountability"

Background: Under Maine law, if a law enforcement agency receives a records request under the Maine Freedom of Access Act (FOAA) and one of the underlying records is exempt from disclosure, the agency is required to issue a "Glomar response," i.e. to refuse to confirm or deny the existence of records. This makes it virtually impossible for members of the public, reporters, and lawmakers to know how our taxpayer dollars are being spent, and whether police are engaged in controversial or privacy-invasive practices.

LD 2139 will bring Maine in line with the rest of the nation by repealing the Glomar provision, Title 16, section 807.

Maine's law is unique in the nation. 48 states and the federal Freedom of Information Act do not have Glomar provisions. Only Indiana has a remotely similar law on the books, but Indiana's law is significantly better than Maine's in at least two ways: (1) Maine law *requires* agencies to issue a Glomar response, while Indiana law gives agencies discretion, and (2) Indiana's law permits a Glomar response *only when* confirming a record's existence or nonexistence would itself cause harm by revealing confidential information.

Section 807 has been used to conceal basic information about troubling surveillance technologies. Under Section 807, the Maine State Police has refused to confirm or deny the existence of records about face recognition technology, social media monitoring tools, and cell phone surveillance devices known as cell site simulators. In contrast, law enforcement agencies elsewhere in the country have released records about these technologies.

Section 807 undermines government accountability. Without access to basic information about how taxpayer dollars are being spent and whether police are using privacy-invading surveillance tools, Maine residents and lawmakers cannot engage in informed debates about new threats to privacy in the digital age.

Section 807 is out of step with Maine values. The Maine Legislature has a strong tradition of protecting Mainers' privacy rights, including passing one of the first and strongest laws protecting cell phone location information against warrantless searches, and the strongest internet privacy law in the country.

Repeal of Section 807 will leave plenty of options for protecting confidential information. If a document properly falls under an exemption to disclosure (such as because its release would interfere with an active criminal investigation or constitute an invasion of personal privacy) police can still redact it or withhold it completely. And in narrow circumstances where it is truly necessary, police may still be able to issue a Glomar response.

ACLU

ACLU Maine

TESTIMONY OF NATHAN FREED WESSLER, Esq.

LD 2139 – Ought to Pass

An Act To Increase Government Accountability

Committee on Criminal Justice and Public Safety

March 13, 2020

Senator Deschambault, Representative Warren, and members of the Committee, thank you for the opportunity to offer testimony in support of LD 2139. My name is Nate Freed Wessler, and I am a staff attorney with the American Civil Liberties Union's Speech, Privacy, and Technology Project, where I focus on ensuring that law enforcement agencies' use of surveillance technologies comply with the Fourth Amendment's protections for privacy. In my work, I frequently make use of state and federal freedom of information laws, which are a critical tool for members of the public to hold government agencies accountable. I have also published one of the few law review articles about the precise issue before the Committee this morning—government agencies refusing to confirm or deny the existence or nonexistence of records, which is commonly known as a "Glomar response."[1]

I had planned to travel home to Maine for this hearing, but unfortunately I have had to cancel my trip due to the current public health crisis. Nonetheless, it is a particular pleasure to address this Committee. I grew up in Litchfield and Hallowell, where my

[1] *See* Nathan Freed Wessler, Note, *"We Can Neither Confirm Nor Deny The Existence or Nonexistence of Records Responsive To Your Request": Reforming the Glomar Response Under FOIA*, 85 N.Y.U. L. Rev. 1381 (2010).

mother still lives and is a constituent of Representative Warren. I am also pleased to address Senator Carpenter, who I first met when I was a ten-year-old tagging along with my father to his job in the Attorney General's office under the Senator's leadership.

I remember my social studies teacher at Hall-Dale Middle School teaching me the meaning of Maine's motto, Dirigo: I lead. I am proud of all the ways this state leads the nation on issues of privacy policy and good government, including passing one of the earliest and strongest protections against warrantless access to cell phone location information back in 2013,[2] and passing the strongest internet privacy law in the country last session.[3] But unfortunately, on the issue before the Committee this morning, Maine is dead last in the country. On behalf of the ACLU and ACLU of Maine, I urge the committee to vote "ought to pass" on LD 2139, which would bring Maine back into synch with the laws of 48 other states and the federal Freedom of Information Act. Passing this law will take Maine out of the running for the unfortunate distinction as least transparent and accountable state in the nation.

The current text of title 16, section 807 dangerously undermines the basic transparency that we expect of government agencies in a democratic society. Instead of allowing agencies to respond to requests submitted under the Freedom of Access Act, it requires that Maine law enforcement agencies refuse to confirm or deny the existence or nonexistence of records any time one of the underlying records is exempt from disclosure. This makes it virtually impossible for members of the public, reporters, and lawmakers to know how our taxpayer dollars are being spent, and whether police are

[2] LD 415 (126th Leg., 2013), codified at 16 M.R.S. §§ 647–650.

[3] LD 946 (129th Leg., 2019), codified at 35-A M.R.S. § 9301.

engaged in controversial or privacy-invasive practices. Without basic transparency, there cannot be adequate accountability.

There are two irredeemable problems with Section 807, which are best addressed by repeal. **First**, Section 807 gives agencies no discretion: it *requires* them to refuse to confirm or deny whether they have records on a particular subject. No other state has a law like this, and for good reason. The law is counterproductive, because it hobbles agencies' ability to engage in public debate about matters of public concern, such as whether police are appropriately using invasive surveillance technologies that can sweep in information about innocent bystanders. And it can lead to absurd results. Last week, the Maine State Police dropped its Glomar response about face recognition technology, and provided records on the topic to the ACLU of Maine. That's a good thing. But in doing so, I think MSP arguably violated Section 807. An agency shouldn't have to break the law to provide basic, accurate information to the public.

Second, Section 807 requires Glomar responses when they are not justified, without any showing that responding to a request for records would cause harm. No other state or federal statute or court decision permits this. In narrow circumstances, courts have allowed Glomar responses when information about whether records exist is itself exempt from disclosure. Section 807, in contrast, requires agencies to clam up before they even search for records, and without any showing that confidential information would be revealed by confirming or denying that records exist.

As a result, Maine's practice is way out of step with the practices of federal, state, and local law enforcement agencies across the country. For example, in 2016,[4] and again last week,[5] the Maine State Police refused to confirm or deny whether the agency has records about purchase and use of a controversial and invasive cell phone surveillance technology known as a "cell site simulator" or "Stingray."[6] Issuing a Glomar response about this topic is not the norm. Largely as a result of public records requests about cell site simulator technology submitted by the ACLU, journalists, and privacy activists across the country, we now know that at least 75 state and local law enforcement agencies in 27 states have the technology, as do at least 14 federal agencies.[7] When presented with a request for records about purchase or use of cell site simulators, the vast majority of law enforcement agencies across the country have acknowledged whether they have responsive records, and have released at least some of their underlying documents. This is true of major federal law enforcement agencies such as the Federal

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[4] Curtis Waltman, *Maine State Police "Can Neither Confirm Nor Deny" Use of Cellphone Surveillance*, Muckrock (Nov. 9, 2016), https://www.muckrock.com/news/archives/2016/nov/09/msp-glomar/.

[5] Randy Billings, *Bill Aimed at Lifting Shroud of Secrecy Covering Police Surveillance Advances*, Portland Press Herald (Mar. 3, 2020), https://www.pressherald.com/2020/03/03/bill-aimed-at-lifting-shroud-of-secrecy-covering-police-surveillance-advances/.

[6] Cell site simulators are powerful tools that track, locate, and identify people's cell phones. They work by mimicking legitimate cell phone towers and tricking phones in the area into communicating with the police device instead of the actual tower network. This technology raises privacy concerns because it can precisely locate people, including inside of their homes and other constitutionally protected spaces, and because even when police are looking for a particular suspect, the technology sweeps in information about bystanders who just happen to be nearby, and can even interfere with those bystanders' phone calls.

[7] *See* ACLU, *Stingray Tracking Devices: Who's Got Them*, https://www.aclu.org/issues/privacy-technology/surveillance-technologies/stingray-tracking-devices-whos-got-them.

Bureau of Investigation and the Drug Enforcement Administration and smaller federal agencies such as the Criminal Division of the Internal Revenue Service; of state police agencies from states large and small, from the Florida Department of Law Enforcement to the Delaware State Police; and of police departments in cities ranging in size from New York City, Los Angeles, and Chicago, to Lakeland, Florida, and Rochester, New York. Here in northern New England, I am aware of proper responses from the New Hampshire State Police, Vermont State Police, and the Boston Police Department addressing whether they have records about cell site simulators. Maine's Glomar response stands virtually alone. Indeed, just last week, at the same time that the Maine State Police doubled down on its Glomar response about this technology, I received 1,094 pages of documents from U.S. Immigration and Customs Enforcement about its purchase and use of cell site simulator devices. If ICE can engage in basic transparency about this technology without the sky falling, so can MSP.

This isn't the only concerning surveillance technology about which the Maine State Police have issued a Glomar response. As the Press Herald has reported, MSP refused to confirm or deny the existence or nonexistence of records about face recognition technology to the paper last year.[8] And in 2016, MSP refused to confirm or deny the existence or nonexistence of records about its use of powerful technology that monitors people's constitutionally protected conversations on social media platforms.[9] This, too, is not normal. Numerous law enforcement agencies across the country have

[8] Randy Billings, *Maine State Police May Be Spying On You*, Portland Press Herald (Feb. 9, 2020), https://www.pressherald.com/2020/02/09/maine-state-police-may-be-spying-on-you/.

[9] https://www.muckrock.com/foi/maine-13/geofeedia-inc-contracts-invoice-social-media-surveillance-policies-maine-state-police-30851/.

released records about their use of both of these privacy-invading and error-prone technologies.[10]

Basic transparency matters in a democracy. Transparency provides the information that citizens and lawmakers need to debate and enact protections against government abuses. For example, after police departments in Washington State and Illinois confirmed that they use cell site simulators, lawmakers in those states enacted strong laws that require police to obtain a judge's permission and take other steps to protect people's privacy before using the devices.[11] Information revealing the Baltimore Police Department's use of social media monitoring technology to surveil protesters led to pressure on Facebook, Twitter, and other social media companies, which eventually decided to cut off access to their users' data for the surveillance company being used—and abused—in Baltimore and elsewhere.[12] And in places like Somerville, Massachusetts, and Oakland, California, information about automated face recognition

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[10] *See, e.g.*, Clare Garvie, et al., Center on Privacy & Technology, Georgetown Law, *The Perpetual Line-Up: Unregulated Police Face Recognition in America* 15 (2016), https://www.perpetuallineup.org/sites/default/files/2016-12/The%20Perpetual%20Line-Up%20-%20Center%20on%20Privacy%20and%20Technology%20at%20Georgetown%20Law%20-%20121616.pdf ("[W]e submitted detailed public records requests [about face recognition technology] to over 100 law enforcement agencies across the country. In total, our requests yielded more than 15,000 pages of responsive documents. Ninety agencies provided responsive documents—or substantive responses—of some kind."); *ACLU v. U.S. Dep't of Justice*, __ F. Supp. 3d __, No. 19-cv-290, 2019 WL 6117421 (N.D. Cal. Nov. 18, 2019) (listing information about social media surveillance released by various federal agencies in response to ACLU FOIA request).

[11] *See* 725 Ill. Comp. Stat. 137/5–137/15; Wash. Rev. Code § 9.73.260.

[12] *See* Kevin Rector & Alison Knezevich, *Social Media Companies Rescind Access to Geofeedia, Which Fed Information to Police During 2015 Unrest*, Baltimore Sun (Oct. 11, 2016), https://www.baltimoresun.com/news/crime/bs-md-geofeedia-update-20161011-story.html.

systems has led lawmakers to enact bans or moratoriums on police use of that troubling technology.[13]

Repealing Section 807 is necessary to restoring Mainers' ability to obtain basic information about government practices. But it is important to understand that passage of LD 2139 will leave plenty of options for police in Maine to protect legitimately confidential information. If a document properly falls under an exemption to disclosure, such as because its release would interfere with an active criminal investigation or constitute an invasion of personal privacy, then police can still redact it or withhold it completely.[14]

And, in narrow circumstances where it is truly necessary, police may still be able to issue a Glomar response. That is how things work under the federal Freedom of Information Act (FOIA).[15] FOIA does not have any explicit provision about agencies issuing a Glomar response. But starting in the 1970s, federal courts recognized that if an agency can show that confirming or denying the existence or nonexistence of records on a specific subject would itself reveal a fact that is exempt from disclosure under FOIA, the agency can maintain a Glomar response.[16] There are narrow circumstances where that makes sense. If someone sends a freedom of access request to Maine police asking for records about whether a particular individual is a confidential law enforcement source, courts may deem it appropriate to issue a Glomar response in order to avoid jeopardizing

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[13] *See* Rachel Metz, *Beyond San Francisco, More Cities are Saying No to Facial Recognition*, CNN Business (July 17, 2019), https://www.cnn.com/2019/07/17/tech/cities-ban-facial-recognition/index.html.

[14] *See* 16 M.R.S.A. § 804(1), (3).

[15] 5 U.S.C. § 552.

[16] *See Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

the privacy or safety of that person.[17] But what is not appropriate is an agency using a Glomar response anytime a member of the public seeks basic information about surveillance technologies and police practices that have the potential to violate core constitutional rights. Courts have rightly rejected overbroad Glomar responses under the federal FOIA,[18] and they should have the latitude to do the same in Maine.

A vote for this bill is a vote for transparency. It is a vote to protect our democratic institutions. It would ensure a better informed public, and help guarantee that our tax dollars are spent on sensible policy. I urge you to vote ought to pass.

Thank you for your time and attention. I am happy to try to answer questions, and would welcome any member of the Committee to reach out to discuss this important legislation via my colleagues Meagan Sway and Michael Kebede at the ACLU of Maine.

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[17] *See, e.g., Carpenter v. U.S. Dep't of Justice*, 470 F.3d 434 (1st Cir. 2006) (permitting a Glomar response to protect information about whether a particular person is a government informant); *see also N. Jersey Media Grp. Inc. v. Bergen Cty. Prosecutor's Office*, 146 A.3d 656 (N.J. Super. Ct. App. Div. 2016) (permitting a Glomar response to protect information about whether a particular individual is under criminal investigation in order to prevent "the irreparable harm suffered by a person who has been the subject of unproven allegations of criminal wrongdoing" and has not been arrested or charged).

[18] *See, e.g., ACLU v. U.S. Dep't of Justice*, __ F. Supp. 3d __, No. 19-cv-290, 2019 WL 6117421 (N.D. Cal. Nov. 18, 2019) (rejecting FBI Glomar response as to certain uses of social media monitoring because "disclosure of social media surveillance—a well known general technique—would not reveal the *specific means* of surveillance" in ways that would jeopardize particular investigations); *see also ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013) (rejecting CIA Glomar response because the agency's justification for it was "neither logical nor plausible").

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'Neither For Nor Against LD 2139

An Act To Increase Government Accountability

Presented by Representative Warren
March 13, 2020 at 10:00 am
Room 436 Statehouse

Senator Deschambault, Representative Warren, and Members of the Joint Standing Committee on Criminal Justice and Public Safety:

My name is Major Chris Grotton, and I am here to represent the Maine State Police and the Department of Public Safety to testify neither for nor against LD 2139.

This bill would strike Maine's current statute that prohibits Maine criminal justice agencies – such as the Maine State Police – from confirming the existence or nonexistence of intelligence and investigative record information to any person or entity that is not eligible to receive the information.

We understand that the reason this bill was introduced was at least in part because our agency did not confirm the existence or nonexistence of records pertaining to the use of certain investigative technologies in response to a recent 'open records' request we received.

We think it is vitally important that we have a conversation about how section 807 relates to that response. In having that conversation, however, it is also important to bear in mind that section 807 serves an overall important public policy function. This is because the statute, among other considerations, ensures that the privacy rights and reputations of individuals – be they accused persons, victims, or minors – are shielded; that the safety and lives of confidential informants are protected; that the ability to conduct discrete

investigations is ensured; and that security measures that are used to protect members of the public remain are not undermined.

At first glance repealing section 807 altogether might seem to be a straightforward way to provide more transparency into the operations of the government. Before doing so, however, is very important to understand how a total repeal would affect the balance amongst considerations of government transparency, personal privacy, and personal and public safety and security.

A few examples of factors that need to be weighed when considering LD 2139:

- It is not difficult to imagine why security plans developed around an event or protective function are confidential. The effectiveness of security and the physical security of protected persons require the statutory protection that section 807 in part provides;
- Law enforcement agencies maintain records of investigations involving substantiated and unsubstantiated complaints against individuals, including minors. The current requirement to maintain the confidentiality of such records is critical to protecting the privacy and reputational interests of all members of the public, and section 807 at times serves an important statutory function to ensure that the reputations, future livelihoods, and personal privacy interests of members of the public are effectively protected;
- Individuals acting as confidential informants must rely on the criminal justice agencies with whom they are working to protect their identities and keep them and their families safe. If records identifying a confidential informant were publicly released – or even confirmed to exist – not only would that confidential informant's life and personal safety be put at risk, but there also would be a disincentive for others to provide information to the government that would help to solve and prevent crimes;
- The confidentiality of investigative practices and techniques allows law enforcement to effectively solve crime. If the general public had access to records that reveal specific investigative, forensic, or technological capabilities (and limitations) of law enforcement agencies, such access would have an adverse impact on the ability to solve crimes and protect the public. Section 807 serves an important function by ensuring that law enforcement agencies do not have to confirm the existence or nonexistence of records that would reveal these capabilities;
- Technology also provides opportunities to effectively solve crime. While we understand the trepidation that can come with the introduction and use of new technologies, we also recognize our shared responsibility to protect the public and effectively solve crime. As an example of the use of a type of such technology: In the aftermath of a widespread increase in pharmacy robberies, we began deploying

opioid pill bottles with GPS trackers which would activate after a robbery and help the police locate the suspects. If, at that time, we had been required to disclose the existence of records showing that we used that technology, the tool would have been rendered ineffective.

Those examples highlight the challenges we all face to find the appropriate balance between law enforcement's duty to effectively solve crime, the need to reasonably protect personal privacy and reputational interests, and the public's understandable desire for government transparency.

In closing, we appreciate and respect the good intentions of the bill. We also understand the need to reexamine the policy underlying section 807 and to have the discussion that LD 2139 bill will encourage. We also are very aware, however, of the probable unintended consequences that would result if the statutory authority provided by section 807 were repealed in its entirety. We welcome the opportunity to be a part of this discussion as you consider this important issue.

On behalf of the Maine State Police and the Department of Public Safety I thank you for your time, and I would be happy to respond to any questions that you might have.

OFFICE OF POLICY AND LEGAL ANALYSIS
BILL ANALYSIS

TO: **Members, Joint Standing Committee on Criminal Justice and Public Safety**

FROM: **Jane Orbeton, Legislative Analyst**

DATE: **July 13, 2020**

LD: **2139, An Act To Increase Government Accountability (Rep. Warren)**

SUMMARY:

This bill repeals from the Intelligence and Investigative Record Information Act, Title 16, section 807. Section 807 prohibits a Maine criminal justice agency from confirming the existence or nonexistence of confidential intelligence and investigative record information to any person or public or private entity that is not eligible to receive the information itself.

Section 803, subsection 4 defines criminal justice agency. Section 803, subsection 7 defines intelligence and investigative record information. Note that Intelligence and investigative record information does not include criminal history record information or records pertaining to juvenile justice. It does include investigative techniques and procedures and security plans and procedures prepared or collected by a criminal justice agency or other agency.

Section 804 prohibits a criminal justice agency from disclosing confidential intelligence and investigative record information under 12 listed circumstances. Section 804 then cross-references section 805, which provides 6 exceptions to confidentiality. Section 804 also cross-references section 806, which provides 4 exceptions that are subject to reasonable limitations.

ISSUES FROM PUBLIC HEARING:

1. Megan Sway, representing the ACLU of Maine, testified in favor of the bill, pointing out that section 804 provides sufficient protections for intelligence and investigative record information and that criminal justice agencies should be free to apply the provisions of sections 804, 805 and 806 and determine whether disclosure is appropriate. Megan Sway provided written testimony from attorney Nathan Freed Wessler, from the ACLU's Speech, Privacy and Technology Project, supporting the bill.
2. Major Christopher Grotton, representing the Maine State Police, testified neither for nor against the bill. Major Grotton underscored the important privacy considerations that the law protects and expressed willingness in working with the ACLU on a proposal.

FISCAL IMPACT:

No fiscal information available at this time.