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## Judicial Performance and Policy Implications in *Moore v. Abbott*

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# JUDICIAL PERFORMANCE AND POLICY IMPLICATIONS IN *MOORE V. ABBOTT*

*Andrew C. Helman*

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## JUDICIAL PERFORMANCE AND POLICY IMPLICATIONS IN *MOORE V. ABBOTT*

*Andrew C. Helman\**

### I. INTRODUCTION

In *Moore v. Abbott*,<sup>1</sup> a divided Maine Supreme Judicial Court, sitting as the Law Court, held that a three-member panel organized by the Attorney General to investigate alleged misconduct by prosecutors and law enforcement officers did not constitute an “agency” or “public official” under Maine’s Freedom of Access Act<sup>2</sup> (FOAA).<sup>3</sup> Therefore, the panel did not have to release records compiled during its review of the investigation and prosecution of Dennis Dechaine, who was convicted for the 1988 murder of Sarah Cherry.<sup>4</sup> Justice Alexander, writing for the majority, applied a four-part test looking to whether the panel was the functional equivalent of a government agency and concluded that it was not, which meant its records could be kept confidential.<sup>5</sup> Justice Levy, joined in his dissent by Justice Mead, characterized the facts differently and applied a broader version of the functional equivalency test to reach the opposite conclusion: the panel was acting as the functional equivalent of a government agency.<sup>6</sup> However, Justice Levy’s dissent did not go so far as to assert that the records should be public; rather, he concluded that the panel acted as an agency under the FOAA, but that further analysis must be done to determine whether other statutory provisions prevent disclosure.<sup>7</sup>

There are several issues in the *Moore* decision. Most significantly, the majority opinion undermined the Maine Legislature’s policy favoring disclosure of government records. The Law Court previously noted that the FOAA’s purpose “is to open public proceedings and require that public actions and records be available to the public,”<sup>8</sup> a result not achieved here. Additionally, the majority and dissenting opinions did not share the same understanding of the historical facts. For example, it is unclear from the majority and dissenting opinions whether the panel had access to the entire Dechaine file, including photographs of the victim designated confidential by the Maine Legislature, or whether it only had access to portions already available for

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\* J.D. Candidate, 2010, University of Maine School of Law. I would like to thank my wife, Sara. Your love, support, and patience through school mean more than I can say here. Additionally, I would like to thank Professor Melvyn Zarr. Your insight, advice, and scissors helped make this Note possible. Thank you for reading my drafts.

1. 2008 ME 100, 952 A.2d 980 (3-2 decision).

2. ME. REV. STAT. ANN. tit. 1, §§ 401-412 (1989 & Supp. 2008).

3. *Moore*, 2008 ME 100, ¶ 1, 952 A.2d at 981.

4. *Id.* ¶¶ 1-2, 952 A.2d at 981. *See also* State v. Dechaine, 572 A.2d 130, 131 (Me. 1990); State v. Dechaine, 630 A.2d 234 (Me. 1993) (providing substantial procedural history and review of the evidentiary record regarding Dechaine’s conviction).

5. *Moore*, 2008 ME 100, ¶¶ 15-21, 952 A.2d at 984-85.

6. *Id.* ¶ 22, 952 A.2d at 985 (Levy, J., dissenting).

7. *Id.* ¶ 40, 952 A.2d at 989-90.

8. Town of Burlington v. Hosp. Admin. Dist. No. 1, 2001 ME 59, ¶ 13, 769 A.2d 857, 861.

public inspection.<sup>9</sup> Consequently, the majority and dissenting opinions turned to different versions of the law; the majority adhered to a narrow view of the functional equivalency test, while the dissent applied a broader version that is in sync with the way several other jurisdictions supplement their freedom of access laws.<sup>10</sup> Ultimately, the dissent's analysis better effectuated the legislature's policy of openness; therefore, the Law Court should adopt that policy in the future.

This controversy before the court in *Moore* is part of a long history of cases brought by Dechaine and his supporters in an effort to secure a new trial.<sup>11</sup> This Note takes no position on the underlying controversy, but understanding the historical and procedural context is important to grasp the Law Court's decision. Accordingly, the rest of the Introduction describes Moore's efforts in support of Dechaine to the extent necessary. In addition, Part II provides readers with a brief background on the FOAA, as it is currently interpreted by the court. While *Moore* focused on access to public records, the majority and dissenting opinions turned to the FOAA's treatment of public proceedings for guidance as well as to reconcile of an important case applying the FOAA to public proceedings, *Lewiston Daily Sun v. City of Auburn*.<sup>12</sup> The majority distinguished *Lewiston Daily Sun*, whereas the dissent persuasively incorporated the decision's reasoning into its analysis under the functional equivalency test.<sup>13</sup> After that, Part III describes the justices' competing versions of the facts in *Moore* and subsequently, how the law should be applied. From there, Part IV argues that the court should adopt the dissent's analysis of the law and suggests that remanding would have been a useful way to gain a better understanding of the underlying facts. However, a legislative solution is also needed because the majority's opinion undermined the Maine Legislature's intent to favor openness and disclosure. As a result, Part V provides sample statutory language, offering policy-makers either a broad or narrow approach, as well as a suggestion for a corresponding amendment to the FOAA's definition of public proceedings.

#### A. Moore's Public Campaign

The case arises out of a series of efforts by James P. Moore, a long-time supporter of Dechaine, to secure a new trial for Dechaine based on his belief that there was misconduct by law enforcement investigators and prosecutors in the Attorney General's Office.<sup>14</sup> Moore, a retired Alcohol, Tobacco, and Firearms Agent, detailed

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9. Compare *Moore*, 2008 ME 100, ¶ 18, 952 A.2d at 985 (characterizing the records as public), with *Moore*, 2008 ME 100, ¶ 25, 952 A.2d at 986 (Levy, J., dissenting) (characterizing a portion of the records as confidential).

10. See generally *Moore*, 2008 ME 100, 952 A.2d 980.

11. See, e.g., *State v. Dechaine*, 572 A.2d 130 (Me. 1990), cert. denied 498 U.S. 857 (1990); *State v. Dechaine*, 630 A.2d 234, 235 (Me. 1993) (denying a motion for a new trial); *State v. Dechaine*, 644 A.2d 458, 458 (Me. 1994) (affirming an order requiring defense counsel to return to the state exhibits wrongly given to defense counsel after the trial); *Dechaine v. State*, KNOSC-CR-95-380 (Me. Super. Ct., Kno. Cty., Jan. 9, 1999) (Marden, J.) (dismissing a motion for post-conviction review); *Dechaine v. Warden*, No. 00-123-P-H, 2000 WL 1183165 (D. Me. July 28, 2000) (denying a writ of habeas corpus).

12. 544 A.2d 335 (Me. 1988).

13. Compare *Moore*, 2008 ME 10, ¶ 19, 952 A.2d at 985 (majority opinion), with *Moore*, 2008 ME 100, ¶ 33, 952 A.2d at 988 (Levy, J., dissenting).

14. *Id.* ¶ 3, 952 A.2d at 982 (majority opinion).

his accusations of misconduct in three books and a report written to support the efforts of Trial & Error—a group of Dechaine supporters with whom Moore is associated.<sup>15</sup> For example, Moore alleged that investigators altered their notes, that the state destroyed evidence during post-conviction litigation, and that prosecutors ignored other possible suspects.<sup>16</sup> Consequently, Moore sought the records of Dechaine’s investigation and prosecution from the Maine State Police and Attorney General’s Office to support his contention that Dechaine was wrongly imprisoned and needed a new trial.<sup>17</sup> Along the way, Moore and Trial & Error attracted the support of several Maine residents, with local chapters of Trial & Error holding meetings.<sup>18</sup> However, they have been largely unsuccessful in their pursuit of a new trial through appellate and federal review.<sup>19</sup>

In response to Moore’s public campaign, the Maine Legislature enacted a private and special law proposed by then-Sen. John Martin (D-Aroostook County) aimed at making the Dechaine investigation and prosecution records public.<sup>20</sup> According to the official statement of legislative intent, the legislature intended to exempt all Dechaine records, except for photographs of the victim, from the operation of an earlier law<sup>21</sup> that generally declared all investigative records created before July 1, 1995, to be confidential.<sup>22</sup> Now, under Sen. Martin’s bill, records relating to the investigation of Cherry’s death are governed by a statute<sup>23</sup> that provides for a general prohibition against disclosure of intelligence and investigative records created after July 1, 1995, unless they fall into certain exceptions that allow for disclosure.<sup>24</sup> That means the Attorney General’s Office keeps the files confidential unless, for example, releasing them would not interfere with an investigation.

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15. See JAMES P. MOORE, HUMAN SACRIFICE (2002); JAMES P. MOORE, HUMAN SACRIFICE: ON THE ALTAR OF INJUSTICE (2006) (an updated and expanded version of HUMAN SACRIFICE); James P. Moore, *Evidence of Misconduct by Officials of the State of Maine in Connection with the Investigation and Prosecution of Dennis Dechaine for the 1988 murder of Sarah Cherry* (2008), <http://www.trialanderrordennis.org/pdfs/report.pdf> [hereinafter Moore, *Evidence of Misconduct*].

16. See generally Moore, *Evidence of Misconduct*, *supra* note 15.

17. See JAMES P. MOORE, HUMAN SACRIFICE (2002); JAMES P. MOORE, HUMAN SACRIFICE: ON THE ALTAR OF INJUSTICE (2006) (an updated and expanded version of HUMAN SACRIFICE); Moore, *Evidence of Misconduct*, *supra* note 15. See Trial & Error, Dennis Dechaine is Innocent, <http://www.trialanderrordennis.org> (“Dechaine’s supporters ask only for a new trial.”).

18. See, e.g., Letter from Jon Lund, former Attorney General, State of Maine, to Bangor Daily News Editorials (unpublished) (Feb. 20, 2008), available at <http://www.trialanderrordennis.org/documents/lundletter.html>. For information on meetings, see <http://www.trialanderrordennis.org/events.shtml>.

19. See, e.g., State v. Dechaine, 572 A.2d 130, 130 (Me. 1990), cert. denied 498 U.S. 857 (1990); State v. Dechaine, 630 A.2d 234, 235 (Me. 1993) (denying a motion for a new trial); Dechaine v. State, KNOSC-CR-95-380 (Me. Super. Ct., Kno. Cty., Jan. 9, 1999) (Marden, J.) (dismissing a motion for post-conviction review); Dechaine v. Warden, No. 00-123-P-H, 2000 WL 1183165, at \*1 (D. Me. July 28, 2000) (denying a writ of habeas corpus).

20. P. & S.L. 2003, ch. 18; L.D. 1097 (121st Legis. 2003) (“An Act To Release the Records of the Attorney General and the Maine State Police Regarding the Investigation, Prosecution and Trial of Dennis Dechaine”). See also Committee File for L.D. 1097 (121st Legis. 2003), Joint Standing Committee on Judiciary.

21. P.L. 1993, ch. 719, § 11.

22. P. & S.L. 2003, ch. 18; L.D. 1097 (121st Legis. 2003).

23. ME. REV. STAT. ANN. tit. 16, § 614 (2006).

24. P. & S.L. 2003, ch. 18; L.D. 1097 (121st Legis. 2003).

Shortly after the enactment of Sen. Martin's bill, Moore filed a public records request with the Maine State Police and received "a large number of documents relating to the State's investigation."<sup>25</sup> However, Moore believed that the Maine State Police withheld key documents from him, such as a canine incident report.<sup>26</sup> Moore then turned to the Superior Court for relief, where he argued that the Maine State Police illegally withheld part of the file.<sup>27</sup> However, reviewing the agency action de novo under the FOAA, the Superior Court concluded that Sen. Martin's bill allowed disclosure of the entire file except for photographs of the victim, and that the Maine State Police had met its obligation to do so.<sup>28</sup> Justice Crowley said much of the evidence Moore submitted to support his argument that the Maine State Police denied his records request "is based on either inferences he draws from the documents he has reviewed or on representations made by third parties."<sup>29</sup> Essentially, the court said, "he has failed to establish that the documents and records he seeks do, in fact, exist."<sup>30</sup>

### *B. The Independent Review*

Meanwhile, Attorney General G. Steven Rowe, who was not in office during Dechaine's trial, grew concerned that Moore's persistent allegations would undermine public confidence in the integrity of his office and Maine's law enforcement officers.<sup>31</sup> Rowe had no reason to believe the allegations were true,<sup>32</sup> but he wanted an effective way for his office to address them and believed there was "no agency or official within state government" tasked with investigating this type of misconduct.<sup>33</sup> Accordingly, Rowe asked three "respected and experienced members of the Maine Bar to independently review the Dechaine prosecution."<sup>34</sup> However, lacking specific legal authority authorizing or prohibiting such a review, Rowe and his staff asked "the individuals whether, as a service to the public, they would be willing to voluntarily undertake the review."<sup>35</sup>

Thus, in October 2004, Rowe asked Charles H. Abbott, Esq., Marvin H. Glazier, Esq., and Hon. Eugene W. Beaulieu to review the investigation and prosecution of Dechaine, focusing specifically on Moore's accusations.<sup>36</sup> Rowe sought individuals "of unquestionable integrity" who have "no ties to the Office of the Attorney General or to any other state agency, and have the necessary knowledge and experience to

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25. Moore v. Poulin, CUMAP-04-38, 2004 WL 3196330, at \*1 (Me. Super. Ct., Cum. Cty., Dec. 27, 2004) (Crowley, J.).

26. *Id.* at \*1 n.2. It is not clear why Moore believed the canine reports were critically important.

27. *Id.* at \*1. While the action was pending, the State Police contacted two former investigators, one of whom "produced personal notebooks as well as micro-cassettes relating to the investigation." *Id.*

28. *Id.* at \*2.

29. *Id.* at \*3.

30. *Id.* at \*4.

31. Appendix to Brief of Appellant at pt. 9, Moore v. Abbott, 2008 ME 100, 952 A.2d 980 (No. CUM-07-467).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *See id.* pt. 6.

thoroughly investigate and evaluate the relevant evidence.”<sup>37</sup> Rowe advised them that the “guilt or innocence of Mr. Dechaine is for the courts,” and asked them to investigate the following accusations: that law enforcement officers altered their notes and reports to attribute incriminating statements to Dechaine; that prosecutors misled the jury regarding Cherry’s time of death; that information about an alternative suspect was withheld from defense counsel; that a rape kit was inappropriately destroyed in 1992, several years after the conviction; and, that prosecutors inappropriately failed to tell the court and defense counsel about a consultant’s opinion of the reliability of DNA tests conducted in 1993.<sup>38</sup> In his charging letter, Rowe asked the panel to “conduct an independent and impartial review of these allegations and provide to me a report of your findings, which will be made public.”<sup>39</sup> He pledged the complete cooperation of his office and assured them that “[s]tate investigative and prosecutorial files regarding this case are public documents . . . and will be made available for your review and copying.”<sup>40</sup> Additionally, he said that investigators and prosecutors of Dechaine would be available for interviews.<sup>41</sup>

It is not entirely clear from the *Moore* opinion or the Superior Court order in this case specifically what records Moore believed the panel reviewed, created, or maintained during its two-year review.<sup>42</sup> Additionally, this author requested from a panel member a description of the records at issue in *Moore*, not a full disclosure, but this request was denied.<sup>43</sup> However, several letters, an affidavit, and the panel’s report, all included in the Appendix to the briefs, show that the panel indeed interviewed investigators and prosecutors.<sup>44</sup> The panel also reviewed documents Justice Beaulieu requested from the Attorney General’s Office, as well as Dechaine’s trial transcript, police reports, the autopsy report, pleadings filed in Moore’s earlier FOAA action against the Maine State Police, affidavits of a Dechaine supporter and two of his lawyers, and an affidavit filed by Hon. Joseph H. Field.<sup>45</sup> Additionally, the report said “[Rowe] made available to us [his] office’s entire file in this matter.”<sup>46</sup> However, it is not clear whether the panel’s access to the Attorney General’s file included the photographs of the victim, which is a point of contention between the majority and dissenting justices in the *Moore* opinion.

After the panel issued its report in August 2006, telling Rowe that “none of the allegations set forth to us in your letter . . . have any substantive merit,” Moore sent a letter purporting to be a public records request to Abbott, Glazier, Beaulieu, and Rowe.<sup>47</sup> In response, the Attorney General’s Office provided Moore with copies of its

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37. *Id.* pt. 9.

38. *Id.* pt. 6.

39. *Id.*

40. *Id.*

41. *Id.*

42. See generally *Moore v. Abbott*, 2008 ME 100, 952 A.2d 980; Appendix to Brief of Appellant, *supra* note 31, at pt. 2.

43. Letter from Seth D. Harrow, Counsel to Marvin Glazier, Vafiades, Broutas & Kominsky, LLP, to Andrew C. Helman, (Oct. 27, 2008) (on file with author).

44. See Appendix to Brief of Appellant, *supra* note 31, at pt. 8.

45. See *id.* pt. 7.

46. *Id.* pt. 8.

47. *Id.* pt. 5.

correspondence to the panel and a letter to a retired detective that was written to schedule an interview.<sup>48</sup> However, the panel members ignored Moore's request.<sup>49</sup>

### C. *The Lawsuit Commences*

On September 20, 2006, Moore named Abbott, Beaulieu, and Glazier as defendants in an action appealing the panel's apparent denial of the records request.<sup>50</sup> Moore argued that the failure to respond to his request for "files, records and reports of the commission" amounted to an unlawful denial of his public records request.<sup>51</sup> In response, Abbott, Glazier, and Beaulieu contended "that they did not constitute a State agency or public official subject to the requirements of the [FOAA]."<sup>52</sup> After dispensing with preliminary matters,<sup>53</sup> Justice Crowley issued an order on July 16, 2007, concluding that the panel was not the functional equivalent of a state agency; therefore, its records did not have to be disclosed.<sup>54</sup> The functional equivalency test adopted by the Law Court supplements the FOAA, which lacks a definition for "agency" or "public official."<sup>55</sup> The test measures whether an entity acted like an agency or official based on four factors: (1) whether the entity performed a governmental function; (2) whether the government funded the entity; (3) the extent of government control over the entity; and (4) whether it was created by private or legislative action.<sup>56</sup> Justice Crowley found that all four factors of the functional equivalency test weighed against finding the panel acted as a state agency and characterized its work as that of a public interest group outside of government.<sup>57</sup> The order did not include factual findings or mention the records requested, except to say: "Petitioner made an [sic] FOAA request for access to files, records and reports compiled during Respondents' independent review."<sup>58</sup> Subsequently, Moore appealed; the Law Court, dividing 3-to-2, affirmed.<sup>59</sup> However, the court's decision raised a

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48. Brief of Appellant at 5, *Moore*, 2008 ME 100, 952 A.2d 980 (No. CUM-07-467).

49. Appendix to Brief of Appellant, *supra* note 31, at pt. 5. Moore sent two requests to the panel members, with the second telling them he planned to treat their lack of a response as a denial under the FOAA; neither garnered a response. *Id.*

50. *Id.*

51. *Id.*

52. *Moore*, 2008 ME 100, ¶ 7, 952 A.2d at 983.

53. Abbott, Beaulieu, and Glazier filed a motion to dismiss, arguing that Moore had missed the deadline for appeal under the FOAA, but the Superior Court noted that the deadline only applies when an agency sends a written notice of denial. *See Moore v. Abbott*, CUMAP-06-49 (Me. Super. Ct., Cum. Cty., Mar. 22, 2007) (Crowley, J.). Otherwise, the appeal is governed by Rule 80C of the Maine Rules of Civil Procedure, which provides Moore with a six-month window in which to file an appeal under title 5, section 11002(3) of the Maine Revised Statutes. *Id.* While the standards of review are different between Rule 80C and the FOAA, the Superior Court and Law Court engaged in a de novo review under the FOAA.

54. Appendix to Brief of Appellant, *supra* note 31, at pt. 2.

55. *See id.* at pt. 3. *See also* ME. REV. STAT. ANN. tit. 1, § 402(3) (1989 & Supp. 2008).

56. Appendix to Brief of Appellant, *supra* note 31, at pt. 2.

57. *Id.* at pt. 4. In addition, Justice Crowley said there was no public funding; the Attorney General's Office exerted little, if any, control over the panel, with the only control being in the selection of the members and describing their charge; and, the panel was created by Rowe's private action, as opposed to legislative action. *Id.*

58. *Id.* at pt. 2.

59. *Moore*, 2008 ME 100, ¶ 1, 952 A.2d at 981.



question: whether the majority's conclusion supports the Maine Legislature's policy favoring openness and disclosure?

## II. THE MECHANICS AND INTERPRETATION OF THE FOAA

### A. *The Mechanics*

Accessing government records is nothing new. Today, every state has laws declaring that, in general, government records and meetings are open to the public.<sup>60</sup> The Maine Legislature enacted the FOAA in 1959<sup>61</sup> and amended it on several occasions, including a substantial overhaul in 1975.<sup>62</sup> Notably, in the first section of the statute, the legislature declared its intent that government action and records be open to public inspection and that the FOAA "be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent."<sup>63</sup> As a corollary, the Law Court strictly construes exceptions to the FOAA.<sup>64</sup>

The first step to understanding when a record is "public" and subject to disclosure begins with the definition of "public record," which consists of three elements. The information sought must be (1) "written, printed or graphic matter" or electronic data in the (2) "possession or custody of an *agency* or *public official*" of the state or a political subdivision that was (3) "received or prepared in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business."<sup>65</sup> However, there are fifteen categorical exceptions, including records designated confidential by statute,<sup>66</sup> which, for example, included the Dechaine files before Sen. Martin's bill was enacted.<sup>67</sup>

Generally, every person has the right to inspect and copy public records during the normal business hours of the agency or official possessing it.<sup>68</sup> No precise timetable is outlined in the statute for responding to a request, unless the agency plans to deny it, in which case the agency has five working days to issue a denial.<sup>69</sup> If a denial is issued, a five-working-day window is then triggered for a requestor to appeal the agency's decision to the Superior Court.<sup>70</sup> When agencies and officials plan to grant

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60. See generally Open Government Guide, <http://www.rcfp.org/ogg/index.php> (providing a state-by-state look at sunshine laws).

61. P.L. 1959, ch. 219 ("An Act Pertaining to Freedom of Access to Public Records and Proceedings").

62. See generally Anne C. Lucey, Comment, *A Section-By-Section Analysis of Maine's Freedom of Access Act*, 43 ME. L. REV. 169 (1991).

63. ME. REV. STAT. ANN. tit. 1, § 401 (1989).

64. *Cyr v. Madawaska Sch. Dep't*, 2007 ME 28, ¶ 8, 916 A.2d 967, 970.

65. ME. REV. STAT. ANN. tit. 1, § 402(3) (1989 & Supp. 2008) (emphasis added). See also Lucey, *supra* note 62, at 184.

66. ME. REV. STAT. ANN. tit. 1, § 402(3)(A) (1989 & Supp. 2008). For a relevant example of a record designated confidential by statute, see ME. REV. STAT. ANN. tit. 16, § 614 (2006), which generally makes law enforcement records created after 1995 confidential, unless they fall into certain categories. Additionally, the Maine Legislature maintains a searchable database of exceptions to the FOAA, available at <http://www.mainelegislature.org/legis/foa/>.

67. P. & S.L. 2003, ch. 18; L.D. 1097 (121st Legis. 2003).

68. ME. REV. STAT. ANN. tit. 1, § 408 (1989 & Supp. 2008).

69. *Id.* § 409(1).

70. *Id.*

a FOAA request, they are supposed to acknowledge the request within a reasonable period of time.<sup>71</sup> The Superior Court reviews appeals under the FOAA de novo and will enter an order compelling disclosure if the denial was unjust or for an improper cause;<sup>72</sup> the court may assess a civil penalty up to \$500 for willful violations of the FOAA.<sup>73</sup> As a signal of the importance the Maine Legislature places on disclosure, appeals under this section are to be placed ahead of all other actions on the Superior Court docket, except for “writs of habeas corpus or actions brought by the State against individuals.”<sup>74</sup>

Similarly, public proceedings are defined in the FOAA to include the business of the legislature and its subcommittees—state boards, commissions, and boards of trustees of the state universities; municipal, county, and school boards—and any advisory organization “established, authorized or organized by law or resolve or by Executive Order.”<sup>75</sup> Generally, members of the public shall be allowed to attend,<sup>76</sup> record, or broadcast public proceedings;<sup>77</sup> however, a body or agency may by a three-fifths, on-the-record vote go into executive session to discuss, for example, personnel matters, contractual negotiations, or certain legal issues with counsel.<sup>78</sup> All final action must be taken in public,<sup>79</sup> and if a body takes a final action in secret, a person may appeal to the Superior Court, which after a trial de novo shall nullify the action if it determines it was taken illegally.<sup>80</sup> An appeal of an agency decision allegedly occurring in an illegal executive session is fast-tracked similar to those for denials of public records requests.<sup>81</sup>

### B. Interpreting the FOAA

Despite the seemingly clear statutory language, application of these provisions has not been without difficulty, as *Moore* shows. Notably, especially in the context of the *Moore* decision, is the absence of a definition of “agency” or “public official.” Hence, the Law Court relies on a test that looks to whether an entity is acting as the functional equivalent of an official or agency.<sup>82</sup> The Law Court first used the functional equivalency test in *Town of Burlington v. Hosp. Admin. Dist. No. 1*,<sup>83</sup> an action brought by Burlington to compel a legislatively created hospital district to disclose its records.<sup>84</sup> On appeal by the hospital district, the Law Court looked to the function the hospital district performed and affirmed the Superior Court’s conclusion that some of the

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71. *Id.* § 408(1).

72. *Id.* § 409(1).

73. ME. REV. STAT. ANN. tit. 1, § 410 (1989).

74. ME. REV. STAT. ANN. tit. 1, § 409(1) (1989 & Supp. 2008).

75. *Id.* § 402(2).

76. ME. REV. STAT. ANN. tit. 1, § 403 (1989).

77. *Id.* § 404.

78. ME. REV. STAT. ANN. tit. 1, § 405 (1989 & Supp. 2008).

79. *Id.* § 405(2).

80. *Id.* § 409(2).

81. *Id.*

82. *See, e.g., Moore*, 2008 ME 100, ¶ 11, 952 A.2d at 983.

83. 2001 ME 59, ¶ 16, 769 A.2d 857, 862-63.

84. *Id.* ¶ 1, 769 A.2d at 859.

records had to be disclosed.<sup>85</sup> In so doing, the Law Court relied on a compilation of criteria used by several jurisdictions when determining whether an entity is a public agency or official for the purposes of the FOAA.<sup>86</sup> The four factors established in *Town of Burlington* are: “(1) whether the entity is performing a governmental function; (2) whether the funding of the entity is governmental; (3) the extent of governmental involvement or control; and (4) whether the entity was created by private or legislative action.”<sup>87</sup> The factors are to be weighed, rather than requiring strict adherence to all of them.<sup>88</sup>

In adopting this test, the Law Court joined several other jurisdictions using variations of the criteria.<sup>89</sup> However, in so doing, the Law Court changed the fourth criterion slightly, but from the standpoint of the *Moore* decision, significantly. In *Town of Burlington*, the Law Court characterized the fourth criterion as whether *private or legislative action* created the entity,<sup>90</sup> while other jurisdictions look more broadly to whether *government* created the entity.<sup>91</sup> The effect, in *Moore*, leaves out entities created by Maine’s constitutional officers, such as the Attorney General, who may, in the absence of a statutory prohibition, “exercise all such power and authority as public interests may from time to time require, and may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the states, the preservation of order, and the protection of public rights.”<sup>92</sup>

Similarly, the public proceedings portion of the FOAA has also been subject to interpretation by the Law Court. In *Lewiston Daily Sun*, the Law Court held that an investigatory committee convened by Auburn’s mayor had to conduct its meetings in open, even though the FOAA did not specifically mention “committees” in its definition section.<sup>93</sup> The court reasoned that the “extensive links between the committee and Auburn’s city council and mayor” were sufficient for the committee to fall within the ambit of the Legislature’s intent that meetings of municipal boards be open to the public.<sup>94</sup> The Law Court, when describing the linkages, said that the mayor, acting at the council’s direction, convened the panel, appointed its members, gave it a charge, and told it to investigate whomever it wanted, but suggested it question a few particular people.<sup>95</sup> Additionally, the Law Court said that if the city

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85. *Id.* ¶¶ 16-18, 769 A.2d at 862-64.

86. *Id.* ¶ 16, 769 A.2d at 862. *See also generally* Conn. Humane Soc’y v. Freedom of Info. Comm’n, 591 A.2d 395 (Conn. 1991); *Telford v. Thurston County Bd. of Comm’rs*, 974 P.2d 886 (Wash. Ct. App. 1999); *Ry. Labor Executives’ Ass’n v. Consol. Rail Corp.*, 580 F. Supp. 777 (D.D.C. 1984).

87. *Town of Burlington*, 2001 ME 59, ¶ 16, 769 A.2d at 863.

88. *Id.*

89. *See, e.g., Conn. Humane Soc’y*, 591 A.2d at 397; *Telford*, 974 P.2d at 893-95 (providing an explanation and examples of the development of the functional equivalency test). *See also Ry. Labor Executives’ Ass’n*, 580 F. Supp. at 778-79 (providing an earlier example of the functional equivalency test in the federal courts).

90. *Town of Burlington*, 2001 ME 59, ¶ 16, 769 A.2d at 863.

91. *Conn. Humane Soc’y*, 591 A.2d at 397; *Telford*, 974 P.2d at 893-95.

92. *Withee v. Lane & Libby Fisheries Co.*, 120 Me. 121, 123, 113 A. 22, 23 (1921) (internal quotations omitted). *See also* *Lund ex rel. Wilbur v. Pratt*, 308 A.2d 554, 558 (Me. 1973) (citing *Withee* approvingly); *Superintendent of Ins. v. Attorney Gen.*, 558 A.2d 1197, 1199 (Me. 1989).

93. *Lewiston Daily Sun, Inc. v. City of Auburn*, 544 A.2d 335, 336-37 (Me. 1988).

94. *Id.* at 338.

95. *Id.*

council had conducted the investigation, its meetings would have been required to be held openly.<sup>96</sup> Accordingly, “[t]he council cannot avoid that requirement through its decision to delegate that investigatory function to another entity . . . especially when as here that specially created entity maintains substantial and continuing links with the parent council.”<sup>97</sup> As noted below in Part III, this issue became prominent in *Moore* because the dissent incorporated *Lewiston Daily Sun*’s linkages analysis into its discussion of the extent of government involvement and control with the panel.

### III. THE *MOORE V. ABBOTT* DECISION

#### A. *The Arguments*

On appeal in *Moore v. Abbott*,<sup>98</sup> Moore, a pro se litigant, argued that the Superior Court erred in its application of the four-factor functional equivalency test and that each factor favored a conclusion that the panel acted as the functional equivalent of a government agency.<sup>99</sup> Particularly relevant to the court’s disagreement on whether the fourth factor is limited to legislatively created entities, Moore contended that Rowe’s action as a constitutional officer cannot be interpreted to be that of a private citizen because private citizens lack the power to command government resources and make them available for an independent review.<sup>100</sup> Supporting Moore, the Maine Civil Liberties Union (MCLU) filed an amicus brief arguing that, under two tracks of analysis, the records of the panel would be subject to the FOAA’s disclosure provisions. First, the MCLU argued the panel was also the functional equivalent of a state agency and argued in favor of a broader test for the fourth factor, similar to Moore.<sup>101</sup> The MCLU reasoned, “action by the Attorney General is just as much a state action as action by the Legislature.”<sup>102</sup> Second, the MCLU argued the panel would satisfy a test that looks to the linkages between an advisory panel and the office that created it, as in *Lewiston Daily Sun*.<sup>103</sup> However, the majority declined to adopt the MCLU’s view, which suggested extending the application of *Lewiston Daily Sun*

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96. *Id.*

97. *Id.*

98. 2008 ME 100, 952 A.2d 980.

99. *See* Brief of Appellant, *supra* note 48, at 7. Addressing the first factor, whether the panel performed a governmental function, Moore argued the allegations the panel reviewed would constitute chargeable offenses under Maine law ranging from “Official Oppression to Perjury,” and that investigating crimes is a government function the Legislature designated to the attorney general’s office. *Id.* at 8-9. For second factor, whether the government provided funding, Moore argued the publicly financed resources of the attorney general’s office benefitted the outside investigation through photocopying documents and making employees available to be interviewed. *Id.* at 15. For the third factor, which examines the extent of government control over the entity, Moore argued that the limitations placed on the scope of the panel’s review constituted substantial government involvement and control over its work, because it was specifically not tasked to express an opinion on Dechaine’s guilt or innocence, and was required by the terms of the charge to provide a written report. *Id.* at 16.

100. *See id.* at 17-18.

101. Brief of Amicus Curiae Maine Civil Liberties Union at 13-15, *Moore*, 2008 ME 100, 952 A.2d 980 (No. CUM-07-467).

102. *Id.* at 15.

103. *Id.* at 11.

beyond public proceedings as an alternative to the functional equivalency test in the context of public records.

In response, Abbott, Beaulieu, and Glazier contended that all four factors supported the Superior Court's conclusion that they were not acting as a government agency for the purpose of the FOAA and that *Lewiston Daily Sun* was inapplicable.<sup>104</sup> Essentially, they argued the panel functioned analogously to a public interest watchdog group, as opposed to a government entity.<sup>105</sup> Additionally, they argued that *Lewiston Daily Sun* did not apply because that decision focused on public proceedings as opposed to public records, demonstrated closer linkages between the board and the charging agency, and relied, in part, on the city council's legislative authorization to create the board.<sup>106</sup>

### B. The Court's Analysis of the Four Factors

Ultimately, in a three-to-two majority decision, the Law Court affirmed the Superior Court's application of the four-factor functional equivalency test in a de novo review and held the panel could keep its records confidential because it was not an agency under the FOAA.<sup>107</sup> Instead, the majority held that the panel acted similarly to many private groups providing "advice on a wide range of topics from ways to cut costs and improve efficiency, to ways to improve the economy, to recommendations for appointment of qualified individuals to public positions."<sup>108</sup> However, the majority reached its conclusion without addressing what records, if any, the panel generated, created, or maintained, or how they differed from records Moore previously obtained after the Maine Legislature enacted Sen. Martin's bill—a significant point because the court could have remanded for further factual findings to determine the nature of the

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104. Abbott was represented separately from Glazier and Beaulieu, but their arguments are, for the most part, substantially the same. See generally Brief of Respondent Charles Abbott, Esq., *Moore*, 2008 ME 100, 952 A.2d 980 (No. CUM-07-467); Reply Brief of Respondent Charles Abbott, Esq., *Moore*, 2008 ME 100, 952 A.2d 980 (No. CUM-07-467); Brief of Respondents Honorable Eugene Beaulieu and Marvin Glazier, Esq., *Moore*, 2008 ME 100, 952 A.2d 980 (No. CUM-07-467); Reply Brief of Respondents Honorable Eugene Beaulieu and Marvin Glazier, Esq., *Moore*, 2008 ME 100, 952 A.2d 980 (No. CUM-07-467).

105. Brief of Respondents Honorable Eugene Beaulieu and Marvin Glazier, Esq., *supra* note 104, at 7. For the first factor, Abbott argued that the review could not be a government function because "there was no mechanism for such a function" within Maine's government. Brief of Respondent Charles Abbott, Esq., *supra* note 104, at 7. For the government funding factor, Abbott, Beaulieu, and Glazier argued the panel bore the cost of all out-of-pocket expenses on its own. *Id.* at 8; Brief of Respondents Honorable Eugene Beaulieu and Marvin Glazier, Esq., *supra* note 104, at 7. For the government control factor, they argued the "only level of control the Attorney General exercised . . . was in choosing the three Respondents . . . and then describing the matter he wished the Respondents to investigate." *Id.* at 8. For the fourth factor, whether the panel was created by private or legislative action, they argued Rowe made a "private decision to have them review his office's past work on the murder case in question," *id.* at 8-9, and "the fact that Respondents were asked to serve by a constitutional officer, whose constitutional duties are ordained by both Constitution and statute does not make Respondents or their service, a legislative creation," Brief of Respondent Charles Abbott, Esq., *supra* note 104, at 9.

106. See Reply Brief of Respondents Honorable Eugene Beaulieu and Marvin Glazier, Esq., *supra* note 104, at 3-4; Reply Brief of Respondent Charles Abbott, Esq., *supra* note 104, at 4-6.

107. See *Moore*, 2008 ME 100, ¶ 1, 952 A.2d at 981.

108. *Id.* ¶ 13, 952 A.2d at 984.

records at issue.<sup>109</sup> In contrast, the dissent argued that the majority misapplied the four factors, and then applied a broader version of the fourth factor—whether the panel was created by *government* as opposed to *private or legislative action*—to conclude the panel was the functional equivalent of a government agency.<sup>110</sup> The dissent contended that “a broader understanding of the fourth criterion is necessary because the Freedom of Access Act is not restricted to entities created by legislation.”<sup>111</sup>

Addressing the first factor, whether the panel performed a governmental function, the majority concluded the panel acted like a group of private citizens.<sup>112</sup> In support of this conclusion, the majority contended that the panel’s advice was nonbinding; the group lacked authority to charge, prosecute or sanction; and, the attorney general could treat the report as he wished.<sup>113</sup> Accordingly, the court summarized its conclusion by saying:

A person or entity, acting without statutory authority or state support, who provides nonbinding advice to a state agency or state official, even on a matter that may be of some significance, does not, by providing that nonbinding advice, become an agent of government performing a governmental function for purposes of application of the Freedom of Access Act.<sup>114</sup>

Looking more broadly, the majority also said general state government practice has not treated “such informal advisory groups, either individually or collectively as ‘an agency or public official’ subject” to the FOAA.<sup>115</sup> To support this conclusion, the majority turned to the FOAA’s definition of public proceedings, which includes the business of any advisory organization established by law, resolve, or executive order.<sup>116</sup> The panel was “not in the categories listed in the law, and it was not performing a governmental function to subject it to the law.”<sup>117</sup>

In contrast, the dissent concluded that the heart of the panel’s work was a traditional government function because it was an investigation into allegations of prosecutorial and law enforcement misconduct.<sup>118</sup> The dissent cited two Maine cases for the proposition that an investigation by an outside source can be considered to be a public function, and then argued that the majority minimized several facts to reach its conclusion.<sup>119</sup> For example, the dissent pointed to Rowe’s conclusion that the investigation could not have been completed internally.<sup>120</sup> Further supporting this view, the dissent said the Attorney General “not only provided the panel access to his entire file in the matter, portions of which are explicitly designated confidential by the

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109. See generally *Moore*, 2008 ME 100, 952 A.2d 980.

110. *Id.* ¶¶ 22-40, 952 A.2d at 985-90 (Levy, J., dissenting).

111. *Id.* ¶ 36, 952 A.2d at 989.

112. *Id.* ¶ 15, 952 A.2d at 984 (majority opinion).

113. *Id.*

114. *Id.*

115. *Id.* ¶ 16, 952 A.2d at 984.

116. *Id.* (citing ME. REV. STAT. ANN. tit. 1, § 402(2)(F) (Supp. 2008)).

117. *Id.*

118. *Id.* ¶ 24, 952 A.2d at 986 (Levy, J., dissenting).

119. *Id.* (citing *Cyr*, 2007 ME 28, ¶¶ 3-4, 12, 916 A.2d at 969, 971; *Lewiston Daily Sun*, 544 A.2d at 335-36).

120. *Id.* ¶ 25, 952 A.2d at 986.

Legislature, but also ordered personnel involved in the Dechaine prosecution to cooperate in the panel's investigation."<sup>121</sup>

In addition, the dissent took aim at the majority's methodology for two reasons: first, the dissent accused the majority of conflating the first factor's focus on the function of the panel with the fourth factor's focus on how the panel was created; second, the dissent accused the majority of improperly turning to the FOAA's definition of public proceedings for guidance in interpreting public records.<sup>122</sup> The dissent said the Maine Legislature decoupled the term "public proceedings" from "public records" and, that because the Law Court strictly construes all exceptions to the FOAA, "these limitations do not control our interpretation of 'public records' and the Court's use of these exemptions to narrow the scope of 'public records' runs contrary to both the statutory text and legislative intent."<sup>123</sup>

For the second factor—whether the government funded the panel—the majority and dissent agreed that the government did not fund the panel; therefore, this factor weighed against finding the panel to be the functional equivalent of an agency.<sup>124</sup> Essentially, the majority characterized the investigation as self-funded by Beaulieu, Glazier, and Abbott, and said that they received only incidental logistical support.<sup>125</sup>

Addressing the government involvement and control factor, the majority concluded the panel was free from government control because, beyond incidental support, the Attorney General intentionally had no involvement in or control over the investigation.<sup>126</sup> The majority based its conclusion on its view that the facts showed "no indication that the Attorney General made or attempted to make any effort to limit the extent or scope of the investigation, its timing, its evidence development process, the choices of persons to be interviewed, or any other aspect of the defendants' activities."<sup>127</sup> Further, in the majority's only allusion to the type of records the panel compiled, the court said the incidental support by the Attorney General's office included copies of records that were already part of the public record.<sup>128</sup>

Disagreeing, the dissent said the panel acted within the scope of work delineated by the Attorney General, so the factor should weigh in favor of finding that the panel acted like an agency.<sup>129</sup> Again, the dissent said the majority minimized certain facts: that the panel had a narrow charge; that it did not release its report to the public, but gave it to the Attorney General; and that its report "acknowledged the Attorney General's control over the scope of its investigation."<sup>130</sup> Further, the dissent turned to *Lewiston Daily Sun's* linkages test as a standard by which to measure the Attorney General's control over the panel.<sup>131</sup> For example, the dissent said:

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121. *Id.* (citation omitted).

122. *Id.* ¶¶ 27-28, 952 A.2d at 987.

123. *Id.* ¶ 28, 952 A.2d at 987.

124. *See id.* ¶ 17, 952 A.2d at 984 (majority opinion); *id.* ¶ 29, 952 A.2d at 987 (Levy, J., dissenting).

125. *Id.* ¶ 17, 952 A.2d at 984 (majority opinion).

126. *Id.* ¶ 18, 952 A.2d at 985.

127. *Id.*

128. *Id.*

129. *Id.* ¶ 30, 952 A.2d at 987 (Levy, J., dissenting).

130. *Id.* ¶¶ 31-32, 952 A.2d at 987-88.

131. *See id.* ¶ 33, 952 A.2d at 988.

As with the mayor in *Lewiston Daily Sun*, the Attorney General exercised no direct control over the panel during the course of its investigation. He did, however, exercise substantial control over the panel's formation, its composition, its access to departmental resources, the scope of its inquiry, and the distribution of its findings. Therefore, this factor weighs in favor of a positive finding that the panel acted as a public agency.<sup>132</sup>

For the fourth factor—whether the panel was created by private or legislative action—the majority concluded there was no legislative mandate that created the panel.<sup>133</sup> Distinguishing this case from *Lewiston Daily Sun*, the majority said the facts were different because here there was no “official legislative or executive authorization,” while in *Lewiston Daily Sun* Auburn's mayor, acting on the city council's direction, created the investigatory panel.<sup>134</sup> While the majority adhered to the binary categories of “private or legislative,” in dicta the opinion implied that it would analyze this factor differently had there been an executive order “or other official action creating this advisory group.”<sup>135</sup> It is not clear what level of action by the Attorney General would be sufficient for the majority to consider it “official” under this analysis. Instead, the majority said, “all that existed was a letter from the Attorney General requesting that the three attorneys conduct an independent investigation and provide to him a nonbinding advisory report.”<sup>136</sup> As a result, the majority said the panel “was not created by legislative action or even by Executive Order to bring it within the criteria we outlined.”<sup>137</sup>

In its most significant departure from the majority's analysis, the dissent argued for a broader test that looked to whether *government*—as opposed to merely *legislative* action—created the panel.<sup>138</sup> The dissent contended that this broader view of the fourth factor is necessary because the FOAA's scope extends beyond just legislative creations; for example, turning to the definition for public proceedings, the FOAA applies to advisory committees established by executive order, and requires many public officials whose positions are not created by the legislature to undergo training in the statute's mechanics.<sup>139</sup> Based on this analysis, the dissent concluded that the Attorney General's action creating the panel constituted an act of government: the Attorney General, acting in his official capacity as a constitutional officer, “conceived of the idea of an independent investigatory panel, appointed its members, delineated the scope of its work, and provided it unfettered access to his staff.”<sup>140</sup> Additionally, the dissent noted that other jurisdictions using a similar functional equivalency analysis characterized the fourth factor broadly in an effort to encompass all entities created by government.<sup>141</sup>

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132. *Id.* ¶ 34, 952 A.2d at 988.

133. *Id.* ¶ 19, 952 A.2d at 985 (majority opinion).

134. *Id.*

135. *Id.*

136. *Id.* ¶ 20, 952 A.2d at 985.

137. *Id.*

138. *See id.* ¶ 35, 952 A.2d at 988 (Levy, J., dissenting).

139. *Id.* ¶ 36, 952 A.2d at 989.

140. *Id.* ¶ 37, 952 A.2d at 989.

141. *Id.* ¶ 35, 952 A.2d at 988 (citing *Conn. Humane Soc'y*, 591 A.2d at 397; *Telford*, 974 P.2d at 893).



While the majority concluded that all four factors weighed against finding that the FOAA applied to the panel, the dissent, on balance, found that three of the four factors supported a conclusion that the panel was an agency under the FOAA.<sup>142</sup> Giving greatest weight to the first factor, the dissent argued that it favored finding the panel acted like an agency because the “power to prosecute rests exclusively with the State and is a core function of sovereign authority;” hence, any investigation into the exercise of that power is “necessarily a derivative expression of this unique authority.”<sup>143</sup> Moreover, the panel’s work “sprang directly from the Attorney General’s exclusive responsibility for the ‘direction and control of all investigations and prosecution of homicides.’”<sup>144</sup> Therefore, the dissent concluded all records held by the panel that would not otherwise be subject to an exception to the FOAA should be disclosed.<sup>145</sup>

#### IV. JUST THE LAW PLEASE: DID DIFFERENT INTERPRETATIONS OF THE FACTS LEAD TO A DISAGREEMENT ON THE LAW?

##### A. *First, the Facts*

The majority and dissenting opinions had different interpretations of the facts and how to weigh them, and their resulting characterizations led to different legal conclusions. Notably, the factual disagreement led to a divergence over the application of the first and third factors of the functional equivalency test: Were Abbott, Glazier, and Beaulieu performing a function that is usually reserved to government? To what extent did the government control their work? In a test based on functional equivalency, these are arguably core questions.

For example, the majority and dissent appear to disagree over whether Abbott, Glazier, and Beaulieu had access to the entire Dechaine file, including parts designated confidential by the Maine Legislature, or simply parts of the file already available for public inspection under Sen. Martin’s bill.<sup>146</sup> Implicit in the majority’s characterization of the file as “public” is a conclusion that the work of the panel was not truly an investigation and also that it was free from the type of government control that would be present when handling confidential files. In contrast, the dissent took great pains to note that Rowe not only provided “the panel access to his *entire file* in the matter, portions of which are explicitly designated confidential by the Legislature, but also ordered the personnel involved in the Dechaine prosecution to cooperate in the panel’s investigation.”<sup>147</sup> The dissent’s focus on this characterization appears to be based on a generalization that an investigation into confidential matters involving allegations that the power to prosecute was abused, must be part of the sovereign’s exclusive power to prosecute.

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142. *Id.* ¶ 38, 952 A.2d at 989 (Levy, J., dissenting).

143. *Id.* ¶ 39, 952 A.2d at 989.

144. *Id.* (quoting ME. REV. STAT. ANN. tit. 5, § 200-A (2002)).

145. *Id.* ¶ 40, 952 A.2d at 989.

146. *Compare id.* ¶ 18, 952 A.2d at 985 (majority opinion), with *id.* ¶ 25, 952 A.2d at 986 (Levy, J., dissenting).

147. *Id.* ¶ 25, 952 A.2d at 986 (Levy, J., dissenting) (emphasis added, citation omitted).

Additionally, the dissent argued the majority minimized several facts. For example, it noted that Rowe and his staff discussed whether there was a way to conduct the review within state government and “eventually concluded there was not.”<sup>148</sup> Further, the dissent pointed to Rowe’s charge to the panel: to conduct an “investigation ‘in order to ensure continued public confidence’ in the state’s law enforcement agencies,” which the majority minimized when considering whether the panel performed a governmental function.<sup>149</sup> In contrast, when analyzing whether the panel performed a governmental function, the majority focused on its perception of the panel’s report as nonbinding and that there was “no authority to charge, prosecute, or sanction any misconduct it might have found.”<sup>150</sup>

Lastly, when telling the factual and procedural story of this case, the majority and dissent made different language choices when referring to Abbott, Glazier, and Beaulieu, which provides insight into their legal conclusions.<sup>151</sup> For example, the majority repeatedly referred to Abbott, Glazier, and Beaulieu as “the three,” “[t]he three attorneys,” “the three individuals,” and “the three private citizens.”<sup>152</sup> By peppering its opinion with these referential terms, the majority ignored the fact that the three attorneys were asked to serve as a single group and ultimately created one work product.<sup>153</sup> In contrast, the dissent primarily referred to the attorneys as “the investigatory panel,” “the panel,” and “the entity,” though there was one reference to “three volunteers appointed by the Attorney General.”<sup>154</sup> Rowe’s charging letter, as well as the report ultimately issued, supports the dissent’s treatment of the individuals as a group.<sup>155</sup> Rowe’s letter asked “that you conduct an independent and impartial review . . . and provide to me *a report* of your findings, which will be made public.”<sup>156</sup> The Attorney General’s language referred to a single report, which implicitly suggested that the three attorneys should work as a group. Additionally, the report provided to Rowe supports this analysis. The introductory clause of the first sentence referred to a singular “our report,” and the text made clear that there was a division of labor, with members performing different tasks in the overall review—as opposed to three individuals performing three independent reviews of the same material.<sup>157</sup>

The disagreements over these facts seemed to impact the analysis of the first and third factors, whether the panel performed a government function and the extent of government control or influence. Because of this disagreement, the Law Court would have benefited by remanding to the Superior Court for further factual findings and an

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148. *Id.*

149. *Id.* ¶¶ 25-26, 952 A.2d at 986-87 (quoting Rowe’s letter to the panel).

150. *Id.* ¶ 15, 952 A.2d at 984 (majority opinion).

151. The same observation might be made about this Note.

152. *See, e.g., Moore*, 2008 ME 100, ¶¶ 3-6, 15, 952 A.2d at 982-84. While the majority did use “the group” and “the informal advisory group,” it was qualified in the next paragraph with “the individuals provided collective advice.” *See, e.g., id.* ¶¶ 12-13, 952 A.2d at 983-84.

153. *See* Appendix to Brief of Appellant at pt. 6, *Moore*, 2008 ME 100, 952 A.2d 980 (No. CUM-07-467).

154. *Moore*, 2008 ME 100, ¶¶ 22-27, 39, 952 A.2d at 985-87, 989 (Levy, J., dissenting).

155. *See* Appendix to Brief of Appellant at pts. 6, 8, *Moore*, 2008 ME 100, 952 A.2d 980 (No. CUM-07-467).

156. *Id.* at pt. 6.

157. *Id.* at pt. 8.

in-camera review of the documents in question. An in-camera review would have provided insight into the underlying question of what records, if any, the panel created and maintained and how those records differed from any records Moore previously obtained. Presumably, reviewing the panel's records also would have deepened the court's understanding of the function the panel performed and cleared up an inconsistency that remains: Did the panel have access to the entire file or only those portions already in the public domain?

*B. Then, the Law*

There are two significant differences between the majority and dissenting opinions' view of the law in *Moore*. First, the majority opinion ignored the possibility of using *Lewiston Daily Sun*'s linkages analysis as a lens through which to analyze the third factor of government control; instead, the majority distinguished the case as inapplicable to its analysis of the fourth factor dealing with how the panel was created, based on a view that the city council's authorization in *Lewiston Daily Sun* was tantamount to legislative action.<sup>158</sup> Second, the majority rigidly applied the fourth factor, which looked to how the panel was created, and failed to recognize that the functional equivalency test, as a judicial construct, served as a flexible gap-filler where the FOAA was silent. As a result, the dissent's analysis of the law in *Moore* did a better job of effectuating the Maine Legislature's intent to favor disclosure and openness. Therefore, the Law Court should revisit the functional equivalency test in the future to adopt the dissent's version of the law.

First, by using the linkages analysis from *Lewiston Daily Sun* as a proxy for the government control factor, the dissent successfully avoided conflicting precedent that may cause confusion for municipal officials. Already, one member of the legal community has cautioned municipal officials to err on the side of caution and to assume that an advisory panel similar to the one in *Moore* will be subject to the FOAA's disclosure requirements, based on *Lewiston Daily Sun*, which the court did not overrule.<sup>159</sup> Although it is possible to distinguish *Lewiston Daily Sun* in the context of the fourth factor, based on the fact that the city council authorized Auburn's mayor to create an outside investigatory panel, the similarities are more apparent, as the dissent persuasively argued. The dissent's argument reconciled the two cases successfully by using the linkages analysis as a lens through which to examine the extent of government control and involvement. In comparing the facts in *Moore* with *Lewiston Daily Sun*, the dissent said:

As with the mayor in *Lewiston Daily Sun*, the Attorney General exercised no direct control over the panel during the course of its investigation. He did, however, exercise substantial control over the panel's formation, its composition, its access to departmental resources, the scope of its inquiry, and the distribution of its findings.<sup>160</sup>

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158. See *Moore*, 2008 ME 100, ¶ 19, 952 A.2d at 985 (majority opinion).

159. Amanda A. Meader, Maine Supreme Court Rules on Definition of Public Official, [http://www.bernsteinshur.com/files-publications/Bernstein%20Shur%20Advisory\\_Maine%20Definition%20of%20Public%20Official.pdf](http://www.bernsteinshur.com/files-publications/Bernstein%20Shur%20Advisory_Maine%20Definition%20of%20Public%20Official.pdf) (last visited Mar. 10, 2009).

160. *Moore*, 2008 ME 100, ¶ 34, 952 A.2d at 988.

Accordingly, the dissent concluded this factor weighed heavily in favor of concluding that the panel acted as a public agency and, in so doing, provided a point of comparison for future cases.<sup>161</sup>

Second, the majority's adherence to prior iterations of the four factors led it to a conclusion that runs counter to the Maine Legislature's intent that government business be conducted openly, which is why the legislature directed the courts to construe the FOAA liberally.<sup>162</sup> When the functional equivalency test was first used, the Law Court characterized the fourth factor as whether *legislative or private* action created a hospital district, which represented a narrower view of the test than in other jurisdictions.<sup>163</sup> However, the court did so in a decision that ultimately favored disclosure, in part, because the legislature created the hospital district.<sup>164</sup> Nowhere in that decision is there any language implying that the fourth factor should be used so narrowly in the future; rather, the opinion said that an entity need not strictly conform to each factor and that each should be weighed.<sup>165</sup> In contrast, the majority's strict adherence to this earlier iteration of the functional equivalency test ignores its inherent flexibility as a tool to effectuate the Maine Legislature's policy and elevates the court's policy judgment—that legislative authorization is a necessary condition to determine whether an entity is the functional equivalent of a government agency—above the legislature's policy favoring openness. This was especially true in *Moore*, given that the Attorney General, a constitutional officer with broad powers to do what is necessary to protect the public interest, created the panel in an effort to protect the reputation of Maine's law enforcement community. Here, investigating whether there was misconduct by law enforcement officers or prosecutors, which would have either put rumors to rest or likely resulted in further action, protected the public's interest in ensuring its law enforcement officers and prosecutors obeyed the law. The majority's narrow view of this factor unduly restricted the public's access to information at the expense of the Attorney General's power.

### C. A Roadmap for the Future

Going forward, there are two steps the Law Court should consider. First, the Law Court should adopt the dissent's view of the functional equivalency test because, as already noted, it does a better job of meeting the legislature's intent to favor disclosure and openness while also reconciling *Lewiston Daily Sun*. Second, the Law Court should consider changing its process for cases like this one, where there is a disagreement over the facts. In the future, the court should consider remanding for further factual findings and an in-camera inspection of the records being sought. An in-camera inspection is not a panacea; however, it would have provided insight into what records, if any, the panel created, maintained, or obtained, and how they differ from those *Moore* previously obtained. Doing so would have provided a window into the panel's function and the amount of control the Attorney General exercised.

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161. *Id.*

162. ME. REV. STAT. ANN. tit. 1, § 401 (1989 & Supp. 2008).

163. *Town of Burlington*, 2001 ME 59, ¶ 16, 769 A.2d at 862-63.

164. *Id.* ¶ 17, 769 A.2d at 863.

165. *Id.* ¶ 16, 769 A.2d at 863.

Additionally, it would have cleared up factual differences between the majority and dissent, which may have resulted in an opinion that, if not in agreement on what the law should be, would have at least applied the different versions of the law to the same set of facts. Although unanimity should not be a goal unto itself, Maine citizens benefit from clear decisions based on a uniform understanding of the facts.

## V. TWO LEGISLATIVE OPTIONS

### A. Overview

The results of *Moore* call for a legislative solution because the Law Court's analysis yielded a result that is contrary to the Maine Legislature's intent to foster openness and disclosure of records. There are many possible ways to address the situation. However, two options are presented here; the first would address the situation narrowly by placing the burden for litigation on the state, and the second would address the situation more broadly by addressing the underlying status of the records of advisory panels. An amendment to the FOAA's definition of public proceedings is included to maintain parity in the treatment of public records and public proceedings, to avoid a result similar to *Moore* with regard to public proceedings.

### B. The Narrow Option

A narrow solution tailored to the facts of *Moore* would require advisory panels created for a limited period to turn over all records—whether created, obtained, or maintained—to the charging agency at the conclusion of its work. The purpose behind such an amendment would be to place the burden of responding to public records requests on the appropriate agency of state or local government that created the entity. In *Moore*, that would have meant all records of the panel would have been turned over to the Attorney General's Office, which would have then been responsible for responding to Moore's request and litigating the issues. For example, an amendment to the FOAA's definition of public records could include:

3-B. Public records further defined. "Public records" also includes the records of any advisory organization, including any authority, board, commission, committee, council, task force, or similar organization of an advisory nature, established, authorized or organized by law or resolve or by Executive Order issued by the Governor, or by the action of a constitutional officer once the advisory organization's work has concluded and the records have been turned over to the agency or official that created the advisory organization. All records created, maintained, or obtained by an advisory organization shall be turned over to the agency or official that created the advisory organization within 30 days of the completion of its work.

Of course, "agency or official" could be substituted for "constitutional officer" to achieve a broader effect. This leaves the courts to consider whether the records should be subject to disclosure during the panel's work.

### C. The Broad Option

A broader solution would amend the definition of public records to include the records of any advisory entity, whether created by the Maine Legislature, Governor,

or a constitutional officer, such as the Attorney General. The purpose would be to bring the records of advisory groups such as the one in *Moore* under the ambit of the FOAA. An amended definition of public records could include:

3-B. Public records further defined. “Public records” also includes the records of any advisory organization created by law, resolve, Executive Order issued by the Governor, or by the action of a constitutional officer, unless the law resolve, executive order, or official action by a constitutional officer creating the entity specifically exempts the organization from the application of this subchapter or the records are otherwise confidential under this subchapter.<sup>166</sup>

For a broader impact, “agency or official” could be substituted for “constitutional officer.” This solution could be further refined by the Maine Legislature—ultimately through judicial interpretation—to determine whether the official action exempting the organization from the application of the FOAA is appropriate in a given situation.

In tandem with an amendment to the definition of public records, the Maine Legislature should consider amending the definition of public proceedings to clarify whether a panel such as the one at issue in *Moore* would be required to hold its meetings in public. The advantage to doing so would be in keeping parity between the public’s access to records as well as meetings; however, there may be some advisory entities that perform work best done in private. Accordingly, an amendment to the definition of public proceedings also allowing for confidentiality would be most useful. For example, an amendment could say “public proceedings” means the business of:

F. Any advisory organization, including any authority, board, commission, committee, council, task force or similar organization of an advisory nature, established, authorized or organized by law or resolve or by Executive Order issued by the Governor or by the action of a constitutional officer and not otherwise covered by this subsection, unless the law, resolve or Executive Order or official action establishing, authorizing or organizing the advisory organization specifically exempts the organization from the application of this subchapter.

However, this amendment probably should not stand on its own without a corresponding change to the public records definitions. Otherwise, there would be an imbalance by opening meetings of such groups to the public, but leaving the courts to decide whether their records are confidential.

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166. Maine’s Right to Know Advisory Committee, a legislatively created panel convened to examine public records exceptions and regularly review the FOAA, considered three legislative options in response to *Moore*. Right to Know Advisory Committee, Draft Meeting Summary (Nov. 17, 2008), available at <http://www.maine.gov/legis/opla/RTKSummaryfor11-17-08.pdf>. Ultimately, the Committee declined to make a formal recommendation to the Maine Legislature. See Right to Know Advisory Committee, Third Annual Report of the Right to Know Advisory Committee (January 2009), available at <http://www.maine.gov/legis/opla/rtkrept2009.pdf>. However, the Committee considered language similar to what I have proposed, as well as language that would have codified the dissent’s version of the four factors. Right to Know Advisory Committee, Draft Meeting Summary (Sept. 10, 2008), available at <http://www.maine.gov/legis/opla/rtksummary%20for91008.pdf>. The draft minutes of the meeting indicate that Attorney General Rowe supported the proposal considered by the Committee that is similar to the one proposed in this Note. *Id.*

## VI. CONCLUSION

Ultimately, in *Moore*, the Law Court rendered a decision that restricts access to records of an entity performing an independent review of a law enforcement investigation and prosecution. The majority, by applying a narrow version of the law to its view of the facts, concluded the FOAA did not make the records of the investigatory panel public. In contrast, the dissent took a broader view of the applicable law to reach a decision that favors disclosure. Given that the Maine Legislature clearly stated its intent that the FOAA be liberally construed, the majority decision appears to be at odds with the legislature's direction, especially considering that the functional equivalency test need not be construed so narrowly as to only apply to legislatively created entities when the FOAA applies more broadly.

As a result, this Note makes three recommendations. First, when faced with factual disagreements in a public records case, as here, the Law Court should consider remanding for further factual findings and an in-camera inspection. Doing so would ensure the facts are sufficiently developed and also may lead to fewer split decisions. Second, the Law Court should revisit the functional equivalency test to adopt the dissent's broader view of the fourth factor, so that entities created by *government*, as opposed to solely by the *legislative action*, are subject to the FOAA's disclosure requirements. This would better effectuate the Maine Legislature's intent that the business of Maine's governments be open. Third, the Maine Legislature should amend the FOAA's definition of public records either to require that advisory panels turn their records over to the appropriate charging agency, or to include as public records the records of advisory panels created by the Maine Legislature, Governor, or a constitutional officer. Doing so would ensure that the burden for litigation is placed on the state or appropriate charging agency, as opposed to citizens who have volunteered to serve their cities, counties, or state in an advisory capacity. Otherwise, citizens who volunteer will bear a significant risk of being sued, which could be a disincentive to this type of public service.