STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. CUM-13-155

MaineToday Media, Inc.,
d/b/a *Portland Press Herald/Maine Sunday Telegram*,

Plaintiff/Appellant,

v.

State of Maine,

Defendant/Appellee.

ON APPEAL FROM THE CUMBERLAND COUNTY SUPERIOR COURT

AMICUS BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, NEW ENGLAND FIRST AMENDMENT CENTER, MAINE ASSOCIATION OF BROADCASTERS, MAINE FREEDOM OF INFORMATION COALITION, MAINE PRESS ASSOCIATION, AND ASSOCIATED PRESS.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES

OTHER AUTHORITIES

I. DESCRIPTION OF AMICI

Amici The Reporters Committee for Freedom of the Press, New England First Amendment Center, Maine Association of Broadcasters, Maine Freedom of Information Coalition, Maine Press Association, and the Associated Press are all non-profit entities that represent the interests of national, regional and local journalists. All of the organizations, which either report on the news directly or advocate on behalf of the broader news media, have a direct interest in the accessibility of public records and the dissemination of news on matters of important public interest. They also believe that laws requiring public business to be conducted in the open, including Maine's Freedom of Access Act ("FOAA"), are critical to ensure an informed population and a functioning democracy. To that end, the below described Amici respectfully submit this brief urging the Court to reverse the decision below and, applying the plain text and underlying principles of FOAA's plain text, vindicate the Legislature's stated intent that public records "be open to public inspection" in order "to aid in the conduct of the people's business." 1 M.R.S.A. § 401.

Amici further provide the Court with the following descriptions of their mission and membership:

- **The Reporters Committee for Freedom of the Press**

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that work to defend the First Amendment rights and freedom of information interests of the news media. The

Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

- **The New England First Amendment Coalition**

The Coalition was formed in 2006 by a group of journalists concerned that citizens and reporters are routinely denied access to the work of government: public documents, meetings, hearings. Today, the membership of the Coalition has expanded to include journalists, academics, and interested citizens alike. The goal of the Coalition and its academic partner, the School of Journalism at Northeastern University, is to defend, promote and expand public access to government and the work it does and increase government transparency through education of journalists and private citizens alike.

- **The Maine Association of Broadcasters**

The Maine Association of Broadcasters is a trade association representing radio and television stations in Maine, including many with full-time or part-time news operations dedicated to covering the state. The Association works to advance the interests of broadcasters and the public and contribute to legislative solutions affecting Maine broadcasters.

- **The Maine Freedom of Information Coalition**

Incorporated in January 2001, the Maine Freedom of Information Coalition is a nonprofit affiliation of media, public interest, academic, government and private organizations as well as journalists and academics who share an interest in protecting access to public information as well as government transparency. In cases where public access to government is being denied without cause, the

Coalition works to open records and discourage closed-door meetings. In 2002 and 2006, the Coalition conducted statewide public records audits of government agencies to test compliance with FOAA and help public officials and citizens become more familiar with the existence of the law and learn how to use it.

- **Maine Press Association**

The Maine Press Association is the statewide trade association for daily and weekly newspapers. Its mission, in part, is to improve the conditions of journalism and journalists by promoting and protecting the principles of freedom of speech and of the press and the public's right to know. Its work includes helping members resolve public issues and advocating the public's right to know before the Maine Legislature.

- **The Associated Press**

The Associated Press ("AP") was created in 1846. In the decades since, the AP has been first to tell the world of many of history's most important moments, from the assassination of Abraham Lincoln and the bombing of Pearl Harbor to the fall of the shah of Iran and the death of Pope John Paul. The AP remains the definitive source for reliable news across the globe. The AP is a news cooperative organized under the Not-For-Profit Corporation Law of New York and owned by its 1,500 U.S. newspaper members.

II. SUMMARY OF THE ARGUMENT

FOAA represents the Maine Legislature's attempt to ensure that the public's business is conducted in the open. Under the text of that statute and others implicated in this case, transcripts of 911 calls placed to the Emergency Communications Bureau ("ECB") are public records to be disclosed upon request, subject to limited and discrete protections for personal information. This result is consistent with the language of the operative statutes and the express Legislative instruction that FOAA be interpreted liberally to advance its purpose of open government. The State's attempt to eliminate public access to any and all 911 transcripts (and other documents) that it places in an investigative file is contrary to the proper reading of the laws in question, the purposes of FOAA, the presumptions in favor of access, and public policy. Moreover, contrary to the State's arguments and the decision below, the State has failed to make any sustainable showing that the release of the transcripts in question would be likely to affect a witness's testimony, especially in light of the numerous alternatives that the State has to ensure accurate testimony is presented at trial. Finally, the suppression of 911 transcripts would threaten the ability of reporters to provide the public with valuable, timely information regarding the response and performance of their emergency officials. For these reasons, the decision below should be reversed and the Court should order the State to produce the documents requested by the Appellant.

III. STATEMENT OF FACTS

Amici refer to and incorporate herein the parties' Agreed Statement of Facts, set forth in the Appendix beginning at page 30.

IV. ARGUMENT

A. Transcripts of 911 Calls Are Non-Confidential Public Records.

Under the plain language of FOAA, the Emergency Services Communication Act, and the Criminal History Record Information Act, transcripts of emergency telephone calls directed to the E-9-1-1 System ("911 transcripts") are non-confidential public records and must be disclosed upon request. The Superior Court erred in determining that the 911 transcripts were confidential under the language of the Criminal History Record Information Act. Instead, the plain language of that statute alone requires that the 911 transcripts be disclosed. *Cyr v. Madawaska Sch. Dep't*, 2007 ME 28, ¶ 9, 916 A.2d 967, 970 ("If the statute's meaning is clear, we do not look beyond its words, unless the result is illogical or absurd.").

Moreover, FOAA's statement of legislative purpose makes clear that the Legislature wanted public records to "be open to public inspection" and that FOAA "shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent." 1 M.R.S.A. § 401; *see also Town of Burlington v. Hosp. Admin. Dist. No. 1*, 2001 ME 59, ¶ 13, 769 A.2d 857, 861. Since FOAA's enactment, this Court has "kept steadily before us the legislature's declared purpose that to a maximum extent the public's business must be done in public." *Moffett v. City of Portland*, 400 A.2d 340, 347-48 (Me. 1979)

(emphasis added). There is no real dispute in this case that the 911 transcripts qualify as "public records" under the threshold definition of section 402(3) of FOAA. That provision defines "public records" to include "any written, printed or graphic matter . . . that is in the possession or custody of an agency or public official of this State or any of its political subdivisions . . . and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business." 1 M.R.S.A. § 402(3). The E-9-1-1 System is administrated by a public agency, the ECB. *See* 25 M.R.S.A. § 2926. It is maintained at public expense as an emergency service coordinator for the people of Maine.

The State, however, contends that the transcripts at issue fall within the exclusion from section 402(3) for "[r]ecords that have been designated confidential by statute." The State bears the burden of demonstrating its position, as this Court has long held that the statutory exceptions to FOAA are narrowly construed, in order to advance the Legislature's express direction that FOAA be "liberally construed." *See Med. Mut. Ins. Co. of Me. v. Bureau of Ins.*, 2005 ME 12, ¶ 5, 866 A.2d 117, 120; 1 M.R.S.A. § 408-A. With that important background principle in mind, the State cannot meet its burden in this case. Indeed, the relevant statutory provisions support the view that the 911 transcripts at issue here are public records. The State's argument, by contrast, requires the Court to adopt a tenuous reading of several statutory provisions and would result in an expansive rather than narrow view of the statutory exceptions provided to FOAA.

It bears noting that the Legislature expressly addressed the confidentiality of 911 transcripts in the Emergency Services Communication Act, 25 M.R.S.A. § 2929. Indeed, the Superior Court properly concluded that "the bulk of the information contained in the three 911 calls is subject to disclosure under 25 M.R.S.A. § 2929," with the exception of personal data identifiers (which are not sought here). App. 5. Moreover, although the actual audio recordings of calls made to the E-9-1-1 System are confidential under the Emergency Services Communication Act, it explicitly provides that "information contained in the audio recordings is public information and must be disclosed in transcript form." 25 M.R.S.A. § 2929(4) (emphasis added).

The State relies on language in the Emergency Services Communication Act allowing that records may be "declared to be confidential under other law." It thus contends that the provisions of the Criminal History Record Information Act, 16 M.R.S.A. § 614, establish that public 911 transcripts that become part of a criminal investigation automatically become "intelligence and investigative information" that should be considered confidential for purposes of 25 M.R.S.A. § 2929, and thus falls outside the scope of 1 M.R.S.A. § 402(3). The complexity of this argument alone signals its weakness. If the Legislature wanted to make 911 transcripts confidential in cases involving active criminal prosecution, it easily could have done so. For example, the Legislature quite plainly exempted from FOAA "[m]edical records and reports of municipal ambulance and rescue units," 1 M.R.S.A. § 402(3)(H), and "[j]uvenile records and reports of municipal fire departments," 1 M.R.S.A. § 402(3)(I). The absence of any comparable specific exemption from FOAA

for 911 transcripts in FOAA, the Emergency Services Communication Act or the Criminal History Record Information Act -- combined with this Court's legislative directive to broadly construe FOAA's reach and narrowly construe its exceptions -- weighs heavily against the State's argument here.

Even assuming, *arguendo*, that the Criminal History Record Information Act provides a much broader exemption from FOAA for 911 transcripts than the Legislature specifically provided in the Emergency Services Communication Act, the language of the Criminal History Record Information Act itself cannot bear the weight of the State's argument. Under the Criminal History Record Information Act, "intelligence and investigative information" is confidential only when a "criminal justice agency" compiles (or directs others to compile) the information in the course of an investigation. The ECB is not a "criminal justice agency," *see* 16 M.R.S.A. § 611(4), and it is not included in the enumerated list set forth in 16 M.R.S.A. § 614(1). Moreover, the information in the 911 transcripts was not "compiled" in the course of <u>any</u> investigation.

In accepting the State's contrary reasoning, the Superior Court relied on *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989), in which the United States Supreme Court held that a provision in the federal Freedom of Information Act ("FOIA") exempting records "compiled for law enforcement purposes," 5 U.S.C.A. § 552(b)(7), extended to include within its scope virtually all records of which a federal law enforcement agency takes possession in the course of its activities. This reliance is misplaced for three reasons.

First, unlike the Criminal History Record Information Act, the exemption in *John Doe Agency* was set forth directly in FOIA, and there could be no doubt that Congress intended it to restrict FOIA's reach. The Supreme Court was thus not required to take the winding road to the exemption that the State urges here, or to reconcile that path with a directive to "liberally construe" the statute in favor of access.

Second, although this Court has looked to cases decided pursuant to FOIA to inform its analysis of FOAA, *see Blethen Me. Newspapers, Inc. v. State*, 2005 ME 56, ¶ 13, 871 A.2d 523, 528-29, it has done so where the language is sufficiently "similar." *See id.* The statutory language at issue in *John Doe Agency*, however, contains significant and material differences. Under FOIA, the exemption applies to records or information "compiled for law enforcement purposes." *See John Doe Agency*, 493 U.S. at 153. Under the Criminal History Record Information Act, the word "compiled" is specifically restricted to the manner in which it is obtained: "Intelligence and investigative information means . . . information compiled in the course of investigation of known or suspected crimes." 16 M.R.S.A. § 611(8) (emphasis added). These significant and specific limitations undermine any attempt to import the majority's analysis in *John Doe Agency* into this case.

Third, as observed by the persuasive dissent in *John Doe Agency*, the term "compiled," in context, refers to a criminal justice agency's acquisition or creation of otherwise non-public materials for investigative purposes, not the mere collection by a criminal justice agency of materials produced for other reasons by non-law

enforcement individuals. "Compiled," in context, suggests the performance of independent generative activity, as opposed to merely gathering existing public documents. *John Doe Agency*, 493 U.S. at 161 (Scalia, J., dissenting).

Concluding otherwise would permit serious curtailment of FOAA's guarantee of open government. It is absurd to suggest that the Legislature intended to permit the State to convert an otherwise public document into a non-public one merely by placing it in the files of a criminal justice agency. Indeed, the entire point of FOAA is to permit the public to observe the workings of government, and that interest is at its highest when the material at issue may give rise to a criminal investigation. Nothing in the State's reading of the Criminal History Record Information Act would limit its reach to 911 tapes either. Under its reading of the statute, the State could shield from public view other documents created for non-law enforcement purposes -- such as public meeting minutes, government contracts, audit reports, inspection records, environmental quality reports, etc. -- simply by collecting them in an investigative file.

Moreover, the State's interpretation of confidentiality allows for an exceedingly broad understanding of the duration of a confidentiality classification. Once a document has been placed in an investigative file and shielded from public access, it may remain there indefinitely as long as an investigation is classified by law enforcement as "open." The State's argument thus threatens to dramatically expand its ability to undermine FOAA for any document that might later become of

interest to a criminal investigation, regardless of when and why it was initially created.

B. Even if the 911 Transcripts Were Intelligence and Investigative Records, the State Failed to Meet Its Burden of Demonstrating a Reasonable Possibility that Disclosure Would Interfere with Law Enforcement Proceedings.

Accepting the State's expansive view of "intelligence and investigative records" under the Criminal History Record Information Act, the Superior Court concluded that because the 911 transcripts contained "a breadth of detailed information concerning [James] Pak's conduct and his interactions with the victims on December 29, 2012" and "witnesses have varying incentives and no one can predict how the availability of details might cause a person to bolster or alter his or her story," there was a "'reasonable possibility' that public disclosure of the 911 records would interfere with law enforcement proceedings." App. 8. This decision is backed by no actual evidence of any reasonable possibility of such interference. To the contrary, the Court expressly disclaimed the need for any evidence because of the abstract and unpredictable nature of the inquiry. This approach to the "reasonable possibility" standard set forth in 16 M.R.S.A. § 614(1) is completely at odds with the purpose of FOAA and this Court's practice of narrowly interpreting its exceptions. Rather, if it chooses to reach this point, the Court should make clear that reasonable alternatives to non-disclosure should be considered before documents are ordered to remain confidential under § 614(1).

Requiring the State to demonstrate that the alternatives to control witness testimony are insufficient would comply with this Court's precedent placing the

burden on agencies to justify the withholding of records under FOAA. *See Med. Mut. Ins.*, 2005 ME 12, ¶ 6, 866 A.2d at 120 (citing *Town of Burlington*, 2001 ME 59, ¶ 13, 769 A.2d at 861). It also flows from FOAA's presumption of openness and the legislative command that its provisions be interpreted broadly. 1 M.R.S.A. § 401.

The State has multiple ways in which it can control witness testimony and prevent the purported harm, assuming it exists, that would result from disclosure under FOAA. For example, if the State has a basis to assume that the release of 911 transcripts would affect the veracity of witness testimony, the State can rely on provisions within Maine's criminal and evidence laws to ensure that witnesses testify truthfully based on their own personal knowledge during court proceedings. The Maine Rules of Evidence contain two important provisions that ensure witnesses testify truthfully and are not influenced by other evidence. First, Maine Rule of Evidence 603 requires that "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the witness's duty to do so." The oath requirement serves as a baseline prophylactic which guards against an untruthful witness. Second, Maine Rule of Evidence 615 allows a party to request that the court order witnesses to be excluded from court proceedings so that they cannot hear the testimony of other witnesses. The purpose of the rule is to prevent one witness from hearing another's testimony and conforming to the previous testimony. *See State v.*

Pickering, Me., 491 A.2d 560 (Me. 1985). Rule 615 allows the State in the present case to limit the amount of outside evidence witnesses obtain prior to testifying, ensuring that the witnesses' testimony is derived solely from their own observations, rather than other evidence.

More importantly, the State has made it a crime to lie under oath or tamper with a witness. 17-A M.R.S.A. § 451 allows prosecutors to charge witnesses who lie under oath with perjury, a Class C felony. Alternatively, prosecutors can also charge witnesses who lie under oath with false swearing, 17-A M.R.S.A. § 452, which is a Class D misdemeanor. The State also can prosecute third parties who tamper with a witness to produce false testimony. 17-A M.R.S.A. § 454. Such criminal penalties create strong disincentives for witnesses to lie under oath or alter their testimony, even if they learn of evidence that conflicts with their own impression of events.

Short of charging a witness with a crime, the State also has several other evidentiary rules designed to ensure that witnesses testify truthfully or that enable parties to present the witness's initial impressions. Maine Rule of Evidence 612, for example, allows a party to use a document to refresh a witness's recollection during testimony. The document need not be admissible as evidence, meaning it can be hearsay, and can also include investigative reports by police officers. *See State v. Hamel, Me.*, 2007 ME 18, ¶ 3, 913 A.2d 1287, 1288. And in situations where the witness's memory cannot be revived, the documents can be entered into evidence under an exception to the hearsay prohibition for "past recollection recorded."

Maine Rule of Evidence 803(5); *see Cope v. Sevigny, Me.*, 289 A.2d 682 (Me. 1972) (contents of a document may be entered into evidence when (1) the content of the documents are matters previously known to witness, (2) the record was created at a time when the witness's memory was fresh, and (3) the record was remembered to be an accurate record of the matters described); *State v. Gorman, Me.*, 2004 ME 90, ¶ 45, 854 A.2d 1164, 1174-75 (holding that prosecutors in a murder trial could admit into evidence a prior statement of witnesses given during grand jury proceedings).

Finally, if a witness provides testimony that contradicts statements given in earlier proceedings, the State can seek to introduce the prior statement to impeach the witness's credibility. Me. R. Evid. 607; Me. R. Crim. P. 15(e) (depositions "may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness"). Rule 607 allows the State to impeach its own witness. *State v. St. Germain, Me.*, 369 A.2d 631, 632 (Me. 1977) ("Rule 607 of the Maine Rules of Evidence clearly allows a party to impeach his own witness. A witness may be impeached by the use of a prior inconsistent statement -- written or unwritten -- made by him.").

The Rules of Evidence and related criminal statutes thus provide the State with numerous alternative methods to ensure that original witness testimony is introduced in some form. In the ordinary case, such rules should be more than sufficient to render remote or unreasonable the possibility that disclosure of 911 transcripts will affect witness testimony. Indeed, under our constitutional system

all sorts of information about criminal cases are disclosed to the public prior to trial, through the unsealing of search and arrest warrants, preliminary hearings, and police reports. It is not asking the State too much to actually explain, in a given case, why the release of 911 transcripts is any more likely to affect witness testimony. Surely, such a showing is especially difficult to fathom in a case like this, where police have arrested and charged a suspect. Indeed, the State's efforts to prevent disclosure of 911 transcripts based on concern about abstract and hypothetical harms is akin to efforts to close public court proceedings for fear of tainting a jury pool. Despite the fact that those concerns stem from the fundamental Sixth Amendment right to a fair trial, courts have always affirmed a presumptive right of access to criminal court proceedings, despite the possible impact of such access. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality opinion) ("a presumption of openness inheres in the very nature of a criminal trial under our system of justice"); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 602-03 (1982) (recognizing a First Amendment access right and striking down statute that required "the exclusion of the press and general public during the testimony of a minor victim in a sex-offense trial"); *Press-Enter. Co. v. Super. Ct.* (*Press-Enterprise I*), 464 U.S. 501, 505 (1984) (constitutional presumption of openness to *voir dire* proceedings); *Press-Enter. Co. v. Super. Ct.* (*Press-Enter. II*), 478 U.S. 1, 13 (1986) (recognizing right of access to preliminary hearings). Under the First Amendment, the presumptive right of access can only be rebutted "by an overriding interest based on findings that closure is essential to

preserve higher values and is narrowly tailored to serve that interest." *Press-Enter. I*, 464 U.S. at 510.

In the instant case, the State's concerns about its ability to control criminal proceedings collides with FOAA's presumption of public access in much the same way as a defendant's right to a fair trial conflicts with the public's presumptive right to access criminal proceedings. Parties seeking to close public access to criminal proceedings must also show how available alternatives would be insufficient to avert the purported harm. Incorporating the evidentiary showing necessary to close off access to criminal proceedings into the burden required for the State to invoke 16 M.R.S.A. § 614(1) to withhold records would ensure that the public's presumptive right to records under FOAA can only be overridden in the face of weighty, proven harms.

C. Transcripts of 911 Calls Provide the Public with Valuable Information About the Workings of Government.

Public access to 911 recordings, transcripts, and data associated with the calls enables journalists -- and by extension, the public at large -- to scrutinize how well government first responders handle emergencies where delay, even for a few minutes, or negligence otherwise can have fatal results. Access to 911 calls is a vital government oversight tool in situations that often involve matters of life and death, a point underscored by the fact that 44 states make public 911 records, such as transcripts or audio recordings, in some form. *See* Jamison S. Prime, *A Double-Barrelled Assault: How Technology and Judicial Interpretations Threaten Public Access to Law Enforcement Records*, 48 FED. COMM. L.J. 341, 347-49 (1996).

Journalists using 911 records have uncovered problems with emergency responses, including costly delays that increased the severity of an emergency or, in some cases, contributed to a fatality. Reporting on 911 records has also revealed brazen misconduct by 911 dispatchers, troubling failures of emergency response systems, and questionable police activity that often contradicts official accounts. Although such incidents do not reflect the majority share of emergency personnel -- who often provide admirable service in chaotic, dangerous situations -- the potential for negligence in providing help in emergencies, coupled with the life or death stakes, is precisely why such records should remain open to the public.

1. 911 Records Reveal When Dispatchers, Police Fail to Respond Quickly.

News reports using 911 records have shown how delays in dispatching aid or insufficient responses to emergencies have led to death and injury. For example:

> - Tapes of 911 calls revealed an eight-minute delay before the dispatch of sheriff's deputies after a social worker called 911 to report that a father of two children had locked her out of the house during a supervised visit and that the social worker smelled gas. The 911 records showed that the dispatcher questioned the social worker for nearly seven minutes before saying that he did not know when deputies could respond, dispatching the call as "routine" rather than an "emergency." Deputies arrived to find the house engulfed in flames along with the two boys and their father dead inside. *See* Mike Baker and Gene Johnson, *Tapes Show Delay in Sending Cops to Home*, THE ASSOCIATED PRESS (Feb. 9, 2012), *available at* 2012 WLNR 2783332.[1]

[1] To facilitate access to secondary sources, "WLNR," or Westlaw Newsroom, citations are provided whenever possible.

- 911 records documenting a suicide showed how police at the scene and emergency dispatchers exhibited indifference as they literally watched a man drown at a California beach during Memorial Day 2011. The 911 records showed that as the man attempted to drown himself, police watched from the beach with binoculars and dispatchers made inquiries with other emergency agencies to see if they had a boat available to rescue the man. *See* Tammerlin Drummond, *Where Was the Sense of Urgency in Alameda Drowning?*, CONTRA COSTA TIMES (June 11, 2011), *available at* 2011 WLNR 11735668.

- Records obtained by journalists in Los Angeles showed how a delayed response to an emergency call about a sixteen-year-old boy who collapsed while playing soccer at a middle school might have contributed to his death. In the 911 call, the boy's soccer coach can be heard pleading with the dispatcher that services were needed immediately at Wilmington Middle School. The dispatcher insisted that he needed the middle school's specific street address, despite the coach not knowing it, before he would send an ambulance. Because the coach and other parents did not know the school's exact address offhand, it took an ambulance about thirteen minutes to arrive. At that point, the boy could not be revived. In response to the incident, emergency officials indicated that they would update their systems to automatically include in their databases addresses for all schools in the area to avoid similar delays. *See Dramatic 911 Tapes Released of Soccer Teen Dying as Family Waits for Ambulance*, ABC 13 KTNV-NV (Feb. 12, 2013), *available at* 2013 WLNR 3559613.[2]

The stories above detail precisely how the government responded to particular emergencies where time was of the essence. Delays and slow responses in these situations can cost people their lives or lead to severe injuries. The public

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[2] The audio recording of the call is available at: http://losangeles.cbslocal.com/2013/02/09/dramatic-911-tapes-released-of-soccer-teen-dying-as-family-waits-for-ambulance/.

therefore has an imperative need to be able to review the actions of those charged by the government with helping to save lives. Requiring access to such records allows the public to maintain pressure on public officials to sanction bad actors and to ensure that similar incidents do not occur in the future.

2. 911 Records Can Reveal Dispatcher Malfeasance, Problems with Government Emergency Response System.

Journalists have also used 911 records to uncover inappropriate and illegal behavior by dispatchers that exacerbated emergencies and to learn about technical and physical failings of certain emergency systems that jeopardized public safety:

- In one well-publicized incident, two Detroit 911 operators were charged with misdemeanors stemming from their dismissal of a five-year-old boy's 911 call asking for help when his mother suffered a heart attack. *See* Jim Schaefer and Ben Schmitt, *Operators in 911 Calls Charged: Pair Scolded Detroit Boy, Could Get Jail*, DETROIT FREE PRESS (June 8, 2006), *available at* 2006 WLNR 9796357. The charges were filed after publication of the 911 call transcripts, in which one operator accused the boy, who was the only other person in the house when his mother collapsed, of playing a prank. The dispatcher ended up sending police, though they were told they were responding to a child improperly calling 911 rather than a medical emergency. By the time police had arrived the mother had died. *See* Ben Schmitt, *Boy's Failed 911 Please Put Heat on Police After Mother Dies*, DETROIT FREE PRESS (April 7, 2006), *available at* 2006 WLNR 5901643.

- Records obtained regarding a 911 call in Lincoln Park, Michigan led to the discipline of a veteran police officer after it showed that he repeatedly hung up on a desperate woman because she used profanity while relaying that her father, who was recovering from brain surgery, was having a seizure. The girl called 911 twice more, only to have the officer hang up on her each time. When the girl later went to the police station to get the officer's name, she was arrested and charged with abusing the 911

system. Those charges were later dismissed, with the city placing the officer on a two-week suspension without pay and also agreeing to pay the woman $35,000. *See* Jason Alley, *Lincoln Park: Arbitrator Upholds Officer's Suspension in Light of Botched 911 Calls*, THE NEWS-HERALD (Southgate, Mich.) (Aug. 9, 2009).[3]

- In Baton Rouge, Louisiana, 911 records revealed that a technical glitch led to a thirteen-hour delay before police arrived at the scene of a shooting to find a two-year-old boy inside a home with his dead mother. *See* Joe Gyan, Jr., *Boy Gets $3,400 in Suit Over Slayings*, BATON ROUGE ADVOC. (May 31, 2013), *available at* 2013 WLNR 13448368.

- The impact of government budget cuts to police and emergency responders was acutely felt in Astoria, Oregon when 911 tapes obtained by a reporter showed that there were simply no police on duty during late evening hours to respond to a domestic violence call. The transcripts showed that after the victim called police to say that her ex-boyfriend was trying to break down her front door, the dispatcher said that there were no police on duty to respond to her call. The dispatcher could only offer immediate advice such as, "can you ask him to go away?" and encouraged the woman to hide. The attacker eventually broke into the house and sexually assaulted the woman. *See* Amelia Templeton, *With No Officers to Respond to 911 Calls, Josephine Co. Considers Tax Levy*, OR. PUB. BROADCASTING (May 15, 2013), *available at* 2013 WLNR 12022597.[4]

- Records documenting 911 calls can also highlight problems with other aspects of the healthcare system, as demonstrated when a nurse at an assisted living facility in Bakersfield, California refused to perform CPR on a woman who passed out in the center's dining room. The

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[3] *Available at* http://www.thenewsherald.com/articles/2009/08/09/news/doc4a7dbe1757623166525361.txt?viewmode=fullstory.

[4] *Available at*: http://www.opb.org/news/article/josephine-county-tax-levy-would-add-deputies-fund-the-jail/.

911 records show that the nurse who placed the call refused to give CPR, saying that it was against the facility's policy. The woman was later pronounced dead after emergency personnel arrived. *See* Hailey Branson-Potts, *Nurse Refuses to Help; Woman, 87, Dies*, L.A. TIMES (March 4, 2013), *available at* 2013 WLNR 5286243.[5]

3. 911 Records Can Often Provide New Details About Emergencies or Supplement or Contradict Official Accounts of Incidents.

Just as 911 records can highlight problems with the emergency system itself, the records can also capture a chronology of events that can fill in or sometimes contradict an official version put forward by authorities. The role 911 records play in this situation is crucial because it allows the public to judge whether emergency responders behaved appropriately. Consider several examples:

- In Leonia, New Jersey, 911 tapes revealed how witnesses to a convenience store robbery provided conflicting accounts of the danger the suspect posed before he was shot and killed by police. A woman who initially called 911 reported that the suspect was wielding a "long knife" but also said that the store manager appeared unafraid during the robbery. A second 911 caller who followed the suspect described the weapon as a butter knife and at one point the caller can be heard challenging the suspect to use the knife. *See* Rebecca Baker, *Leonia 911 Calls Conflict on Suspect's Knife*, N.J. REC. (Dec. 11, 2012), *available at* 2012 WLNR 26330816.

- *The Seattle Times* used 911 response data to show that a 2008 snowstorm covering roads in snow and ice led to prolonged delays for individuals seeking medical care. Seattle officials had previously said that the city quickly responded to the storm that shut down streets and traffic

[5] *Available at*: http://latimesblogs.latimes.com/lanow/2013/03/nurse-refuses-to-give-cpr-to-elderly-woman-who-later-died.html.

for nearly two weeks and also said that the weather did not affect emergency response time. But the 911 data reviewed by the newspaper showed that many residents waited hours before getting help from emergency crews, including a woman who waited more than two hours for an ambulance to take her to the hospital after suffering a life-threatening asthma attack. *See* Susan Kelleher and Justin Mayo, *Special Report: 911 Callers Waited Desperately for Help During Last Year's Snowstorm*, THE SEATTLE TIMES (Dec. 20, 2009), *available at* 2009 WLNR 25621182.

- The *Arizona Daily Star* in Tucson, Arizona, obtained 911 records to learn more details about a SWAT team raid where authorities shot a man 60 times. *See* Fernanda Echavarri, *SWAT Raid Fatal Drama is Revealed in 911 Call*, ARIZ. DAILY STAR (May 14, 2011), *available at* 2011 WLNR 11336994. In a 911 call by the man's wife, she describes how she woke him after hearing noises outside and saw a man standing outside a window. She also told dispatchers that her husband, a former Marine, hid the wife and their four-year-old son in the closet before heading toward the front door with an assault rifle, apparently believing that assailants were attempting a home invasion. SWAT team members fired more than 70 times on the man, hitting him 60 times. Police initially reported that the man fired first but later retracted the statement after documents showed that the man's assault rifle had its safety on when he was shot. After police had shot her husband, the wife pleaded with dispatchers for more than five minutes to send an ambulance, with authorities letting paramedics into the home nearly an hour later after expressing confusion over whether the home was part of a series of raids police had planned on homes suspected of being involved in drug trafficking.

Time and again, 911 records provide a minute-by-minute account of dangerous situations that often involve police, medical emergencies, and violence. Disclosure of 911 records can present a different view on particular events involving the police and first responders and can add important context to flesh out what are often brief accounts of the emergencies. Moreover, as shown above, disclosure of

911 records can help identify shortcomings of emergency personnel and can highlight problems with the larger emergency response system. In short, 911 records play a crucial role in allowing the public to understand and scrutinize the government's response to an emergency. Without such access, problems in a government's emergency response system could go uncovered, putting public safety in further jeopardy. Access to 911 records is therefore essential to ensuring that emergency responders act appropriately and that governments maintain an emergency system that can effectively respond when citizens need help.

V. CONCLUSION

For the reasons stated, Amici urge this Court to reverse the decision below and hold that the transcripts at issue are public records that, absent any redaction specifically required by 25 M.R.S.A. §2929(3), must be made public in order to implement FOAA's express purpose to "aid in the conduct of the people's business" by ensuring that the records of public actions "be open to public inspection."

Respectfully submitted,

The Reporters Committee For the Freedom of the Press, New England First Amendment Center, Maine Association of Broadcasters, Maine Freedom of Information Coalition, Maine Press Association, and the Associated Press.

By their attorneys,

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Dated: June 27, 2013

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of June 2013, I have caused copies of this motion to be served upon the parties, by U.S. Mail, at the following addresses:

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