



BETH L. ASHCROFT
DIRECTOR

MAINE STATE LEGISLATURE

OFFICE OF PROGRAM EVALUATION AND
GOVERNMENT ACCOUNTABILITY

To: Members of the Government Oversight Committee
From: Beth Ashcroft, Director of OPEGA *BBA*
Date: July 24, 2008
Re: Summary of Activity on OPEGA Work Paper Confidentiality Issue

It has been awhile since we last discussed whether changes to OPEGA's statute regarding confidentiality of working papers. Consequently, I thought it might be helpful for you to have a brief summary of what has transpired so far and where we are in advance of the next GOC meeting.

In the fall of 2007, I was required to respond to an inquiry by the Right to Know Advisory Committee who was assisting the Judiciary Committee in reviewing confidential records exceptions existing in statute. My response to that inquiry is the first attached document and it gives my thoughts on why maintaining confidentiality of OPEGA's working papers is important. It also describes changes I would suggest to make the existing statute clearer and allow for OPEGA to share its working papers with other auditing or investigative entities.

As a result of the response I sent, I was asked to draft statutory language for the changes I had proposed. I did so and sent them to the OPLA Analyst that was staffing the Right to Know Advisory Committee. It was my expectation that the proposed language changes would be vetted with the Right to Know Advisory Committee prior to that Committee making its recommendations to the Judiciary Committee. Instead, I discovered part way through last session that the draft language I had proposed had been dropped into LD 2212 which was being considered by the Judiciary Committee. Upon reviewing the language I had originally drafted and in hearing from others about the bill, I realized that it was being interpreted in a way I had not intended – i.e. folks thought that it was adding greater protection for the working papers. Consequently, I suggested to the Judiciary Committee that proposed changes to OPEGA's statute in LD 2212 be further revised. You will find the original proposed language for LD 2212 and my subsequent suggested changes in the second document in this packet.

The Judiciary Committee determined that it wanted input from the GOC prior to taking action on the portion of LD 2212 related to OPEGA as discussion of the proposed language changes had raised policy issues and in March 2008 sent a letter to the GOC requesting that input. This is the third document in your packet. The GOC indicated its interest in reviewing the OPEGA statute and related policy in an April 2008 memo to the Judiciary Committee (fourth

document in your packet). The GOC but explained, however, that it would not be able to give the matter adequate attention until after the session.

The Judiciary Committee ultimately did not include any changes to OPEGA's statute in its report out of LD 2212 with the expectation that the GOC would be taking the next action in reviewing the statutory provisions and related policy.

In the discussions that the GOC has had so far regarding the confidentiality provisions in OPEGA's statute, there has been some interest expressed in allowing for some release of working papers beyond what the current statute or my suggested changes allows. Consequently, I did some research about provisions in other states and have drafted possible additional changes to OPEGA's statute for the GOC's consideration. This would be the fifth document in your packet.

Lastly, I have been getting guidance from Linda Pistner in the Attorney General's Office on all the language changes I have suggested. In fact, I had issued a request for an AG's opinion on certain matters related to the current statute in July 2007 and did not receive an answer until late in the discussions around LD 2212. As Linda Pistner was a member of the Right to Know Advisory Committee, she was able to provide input to the Judiciary Committee regarding the matters that I had requested an opinion on and which I was attempting to clarify in my proposed changes to the statute in the first place. The last document in this packet is a copy of my original request for an AG's opinion and the response I received from Linda Pistner. This will give you a sense of the AG's thoughts on what the current statute does and does not provide for.

So – we are at the point where the GOC needs to discuss whether my proposed changes to the current OPEGA statute should be made and whether there should be a policy change regarding the confidentiality of working papers, i.e. should the statute for their release after the report is issued and, if so, under what circumstances.



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OFFICE OF PROGRAM EVALUATION AND
GOVERNMENT ACCOUNTABILITY

To: Senator Barry Hobbins, Chair
and Members of the Right to Know Advisory Committee

From: Beth Ashcroft, Director of OPEGA

Date: October 22, 2007 *BFA*

Re: Request for Information on Confidential Documents

OPEGA is still a relatively new office that was established to examine the effectiveness, efficiency, economy, and proper use of resources related to State government programs and activities, as well as non-State entities receiving State funds or State-administered funds. A key part of our mission is to improve the accountability, oversight and performance of State government for the benefit of Maine's citizens and we fully support transparency in government. We also feel strongly, however, that the exceptions to public records contained within our statute are critical to the effectiveness of our function and other functions like ours within government. Consequently, we welcome this opportunity to bring transparency to our position and look forward to discussing it further with you or the Judiciary Committee.

Please find below the answers to questions posed in regards to 3MRSA §997, sub-§§ 1, 3, 4-6.

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

Sub-§1 – This exception applies to all draft reports, draft presentations and related documents provided to the agencies under review as well as letters, memos, or electronic communications related to those documents. This exception applies whenever OPEGA is at the point of finalizing its work and developing a final report on an audit. This exception has never been cited in denying a request for production of records.

Sub-§4.B – This exception applies to any documents or information obtained by OPEGA during the course of an audit or evaluation that is privileged or confidential under law. OPEGA must treat this information in the same manner as the agency that provides it. OPEGA may only disclose this information as provided by law and with agreement of the agency subject to the audit that provided the information. It is OPEGA's policy to refer requests for such information to the agency itself rather than provide the information. This exception to public access applies whenever OPEGA has to gather privileged and confidential information. Over the last 2 ½ years, OPEGA has performed 4 reviews where this exception applied. We have never cited this exception in addressing requests for production of records.

Sub-§§3, 5 – These exceptions apply to OPEGA's work papers. "Working paper" is defined in 3MRSA §992 as "all documentary and other information acquired, prepared or maintained by the office during the conduct of a program evaluation, including all intra-agency and interagency communications relating to a program evaluation and includes electronic messages and draft reports or any portion of a draft report." Performing reviews is OPEGA's primary function. In order to meet the professional Government Auditing Standards issued by the United States Government Accountability Office, we maintain working papers for every review whether or not it proceeds to a full audit or study. These reviews include the preliminary research work that OPEGA performs on complaints, allegations or audit requests that we receive from legislators, citizens or State employees.

Under the Standards, auditors must prepare audit documentation related to planning, conducting and reporting in sufficient detail to enable an experienced auditor, with no connection to the audit, to understand the nature, timing, extent and results of audit work performed, the audit evidence obtained and its source and the conclusions reached, including evidence that supports the auditors' significant judgments and conclusions. Supervisory review of audit documentation is also an essential element of assuring audit quality. Consequently, OPEGA documents virtually all planning and audit work performed including decisions and judgments made and the basis for those decisions and judgments. Audit work papers (which OPEGA maintains primarily in electronic form using a special computer application) can include a wide variety of documents obtained or prepared like:

- work plans and planning documents;
- listings of individuals contacted during the review and related contact information;
- summaries of interviews;
- summaries of meetings held amongst OPEGA staff, with the auditees or with others;
- flowcharts or narrative descriptions of processes;
- analyses of data or other information (and the original data sources the analyses were based on);
- summaries of research conducted;

- survey responses;
- email communications;
- copies of reports, policies and procedures or laws and regulations pertaining the audit subject; and
- spreadsheets of transactions or case files tested for particular attributes.

The exception in sub-§3 has been cited once in the last 2 1/2 years in denying a request for the production of records when a citizen was seeking an advance copy of a planning document that was to be presented to the Government Oversight Committee while the audit was in progress. The exception in sub-§5 has been cited three times in the last 2 1/2 years. Two of those requests came from a same media representative after final reports had been released, one seeking more detail on a sensitive audit finding and the other seeking the raw data file used by OPEGA in performing data analyses. The third request was from an agency representative seeking copies of a citizen's complaint letter and associated Request for OPEGA Audit Form prior to those documents being made public in a Government Oversight Committee meeting.

Sub-§6 – This exception protects the identities of individuals who submit complaints or allegations to OPEGA, or otherwise provide OPEGA with information concerning potential, planned or in progress reviews, where those individuals want to remain anonymous. It applies to any documents and electronic communications received or created by OPEGA that include sufficient information to identify the individual. This may be the individual's name, SSN, phone number, address and etc. or the specific description of a situation such that the identity of the individual could readily be deduced. In the last 2 1/2 years, there have been only several times that this exception applied in that the individual requested anonymity. This exception has never been cited in denying a request for records.

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

OPEGA supports the continuation of these exceptions for the following reasons:

1. They are critical to the effectiveness of our function.
 - a. It is imperative that OPEGA have access to records that are otherwise confidential and we occasionally have to include confidential records in our documentation. Keeping OPEGA's working papers confidential provides an extra layer of protection to assure those records stay confidential and makes agencies more comfortable in sharing confidential records with us.
 - b. It is essential that individuals feel comfortable sharing information with us openly and candidly without fear of retribution by superiors or public scandal. While our professional standards require us to

document the sources of our information (i.e. name or title) as well as what those sources provide us or tell us (if pertinent to the review), the fact that our working papers are kept confidential, and that we can keep identities confidential, allows us to assure our informants that others will not have access to the details of our discussions or the sources of information provided to us.

- c. It is also essential that our work remain as unaffected by political influence or public pressure as possible. Protecting draft reports and working papers from public access helps ensure that OPEGA and the Government Oversight Committee will not be subject to such influence and pressure prior to the final report being released by those who may not agree with the methods or results.
2. They prevent the spread of misinformation within State Government and to the public at large.

Auditing is a process and documentation is created throughout the entire process. The information we receive and document as we proceed through later phases of that process can corroborate, contradict or otherwise add different perspectives to information gathered earlier in the review. The report we issue is the final synthesis of all information gathered with proper context and perspective gleaned over the course of the review. What we report may differ from specific information documented on any particular working paper as our end result may have been informed by many pieces of work that are documented on separate working papers throughout the project documentation. In accordance with the Government Auditing Standards, we strive to maintain and organize documentation such that an independent experienced auditor would be able to follow our process and come to the same final results. However, these same working papers taken individually could lead to specific pieces of work or individual statements being misunderstood or misused.

I would be happy to discuss specific examples with you in more detail.

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

I currently have a formal request for an opinion pending with the Attorney General's Office which addresses several issues that have come up with regard to the confidentiality provisions in the statute. See attached. For example, we have received requests from one individual who had the impression from reading statute that OPEGA's working papers became public documents after the final report on an audit was submitted to the Government Oversight Committee. In fact, sub-§5 keeps them confidential even after the report has been released. This

was confirmed informally by the Attorney General's Office when OPEGA first began operation. I believe the requestor's confusion may be derived from the fact that sub-§3 also covers the confidentiality of working papers but only talks about them being confidential prior to the release of a report, thus leaving the impression that they later become public documents.

In addition, OPEGA, the State Auditor and the Internal Audit function within the State Controller's office attempt to coordinate and avoid duplicating audit work whenever possible. In the past year, this has led to situations where we desire to share work papers with each other with the understanding that they would be treated the same as State Audit working papers, which are also confidential under 5MRSA §244-C sub-§3, and would not be released to others without my consent. Sub-§5 seems to imply, however, that I only have the discretion to release them to the entity that was under review.

Another question that has arisen, although it has not really been an issue yet, is whether agencies that we do share working papers with after release of the report are required to treat them as confidential documents.

Question # 4 – *Does your agency recommend changes to this exception?*

I would make the following recommendations:

- a. Pertinent detail from sub-§3 should be combined into sub-§5 so that the result is one sub-§ that deals with confidentiality of reports and working papers. I also believe the wording could be revised to more clear and simple. It would make most sense for the combined new section to follow what is currently sub-§4.
- b. I would also recommend adding to the new/combined subsection language similar to what exists in 5MRSA §244-C sub-§3 defining entities that the State Auditor may release working papers to after the report is released. Should this recommendation be accepted, I would like to participate in establishing the list of those entities.

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

Under the direction of the Government Oversight Committee, OPEGA's authority and the range of subjects we might review are quite broad. Consequently, there are many stakeholder groups that may have interest in these exceptions or potentially be jeopardized by changes to them. These stakeholder groups include: the Government Oversight Committee; the various State and non-State entities that we may audit; State employees; clients and vendors of State agencies; legislators; the media; members of the public; the State Auditor's

Office; the State Controller's Internal Audit Office; and the Attorney General's Office. Soliciting input from representatives of these stakeholder groups would be advisable but I have no specific individuals to suggest.

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

I would like to impress upon the Committee that elimination or weakening of any of the confidentiality provisions in OPEGA's statute would have real consequences requiring thorough exploration and serious discussion. There may be questions raised about how one can judge the accuracy and quality of OPEGA's work if not allowed access to the working papers. In other words, who is in a position to audit the auditors? In fact, there are means for auditing the auditors, as well as other mechanisms that can provide sufficient assurances about OPEGA's activities, quality of work, capabilities and performance without making working papers public documents. I would welcome the opportunity to talk with you about this should you consider proposing recommendations that would eliminate or weaken the public records exceptions related to OPEGA.

Attachment

Cc: Government Oversight Committee Members
Margaret Reinsch, Senior Analyst, Office of Policy and Legal Analysis

Sec. 2. 3 MRSA §997, as amended by PL 2003, c. 673, Pt. GGGG, §9, is further amended to read:

§ 997. Conduct and issuance of program evaluation reports

The director and the office shall adhere to the following provisions relative to conducting and issuing program evaluation reports under this chapter.

1. Review and response. Prior to the presentation of a program evaluation under this chapter to the committee by the office, the director of the evaluated state agency or other entity must have an opportunity to review a draft of the program evaluation report. Within 15 calendar days of receipt of the draft report, the director of the evaluated state agency or other entity may provide to the office comments on the draft report. If provided to the office by the comment deadline, the comments must be included in the final report when it is presented to the committee. Failure by the director of an evaluated agency or other entity to submit its comments on the draft report by the comment deadline may not delay the submission of a report to the committee or its release to the public.

All documents, writings, drafts, electronic communications and information transmitted pursuant to this subsection are confidential and may not be released to the public prior to the time the office issues its program evaluation report pursuant to subsection 3 3-A. A person violating the provisions of this subsection regarding confidentiality is guilty of a Class E crime.

2. Submission of final report to committee. The director shall issue program evaluation reports, favorable or unfavorable, of any state agency or other entity, and these reports are public records. The director shall notify the committee when each final program evaluation report under this chapter is completed. The report must then be placed on the agenda for a future committee meeting. At the meeting where a report appears on the agenda for the first time, the director will release that report to the committee and to the public simultaneously. The committee, at its discretion, may vote to endorse, to endorse in part or to decline to endorse the report submitted by the director. If the committee determines it is necessary, the committee may report out to the Legislature legislation to implement the findings and recommendations of any program evaluation report presented to it by the office.

3. Confidentiality. ~~The director shall issue program evaluation reports, favorable or unfavorable, of any state agency or other entity, and these reports are public records, except that, prior to the release of a program evaluation report pursuant to subsection 2 or the point at which a program evaluation is no longer being actively pursued, all papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of the director or other entity charged with the preparation of a program evaluation report are confidential and exempt from disclosure pursuant to Title 1, chapter 13. All other records or materials in the possession of the director or other entity charged with the preparation of a program evaluation report under this chapter that would otherwise be confidential or exempt from disclosure are exempt from disclosure pursuant to the provisions of Title 1, chapter 13. Prior~~

to the release of a program evaluation report pursuant to subsection 2 or the point at which a program evaluation is no longer being actively pursued, all papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of the director or other entity charged with the preparation of a program evaluation report are confidential and may not be released or disclosed by the director to the Legislative Council or an agent or representative of the Legislative Council. This subsection may not be construed to prohibit or prevent public access to the records of a state agency or other entity in the possession of the director that would otherwise be subject to disclosure pursuant to the provisions of Title 1, chapter 13. The director shall refer requests for access to those records directly to the state agency or other entity that is the official custodian of the requested records, which shall respond to the request for public records.

3-A. Confidentiality of working papers. Except as provided in this subsection, working papers that support reports released pursuant to subsection 2, or that are related to any program evaluation no longer being actively pursued, are confidential and exempt from disclosure pursuant to Title 1, chapter 13. Working papers may not be disclosed to any person, including the Legislative Council or an agent or representative of the Legislative Council. For the purposes of this subsection, "working papers" means all papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of the director or other entity charged with the preparation of a program evaluation report. In accordance with subsection 4, all records or materials in the possession of the director or other entity charged with the preparation of a program evaluation report under this chapter that would otherwise be confidential or exempt from disclosure also remain exempt from disclosure pursuant to the provisions of Title 1, chapter 13. Prior to the release of the final program evaluation report, the director has sole discretion to disclose working papers to the state agency or other entity subject to the program evaluation as long as disclosure will not prejudice the program evaluation and the working papers remain confidential in the hands of the receiving entity. After the release of the final program evaluation report, the director has sole discretion to release working papers, as long as they remain confidential in the hands of the receiving entity, as necessary to:

- A. The department, commission or agency that was subject to the audit or investigation;
- B. Federal agencies providing grants to the audited entity under paragraph A;
- C. Law enforcement agencies for the purpose of criminal law enforcement or investigations;
- D. Other auditors in their work reviewing the office; or
- E. Other departments of audit existing within State Government.

This subsection may not be construed to prohibit or prevent public access to the records of a state agency or other entity in the possession of the director that would otherwise be subject to disclosure pursuant to the provisions of Title 1, chapter 13. The director shall refer requests for access to those records directly to the state agency or other entity that is the

official custodian of the requested records, which shall respond to the request for public records.

4. Information available to office. Upon request of the office and consistent with the conditions and procedures set forth in this section, state agencies or other entities subject to program evaluation must provide the office access to information that is privileged or confidential as defined by Title 1, chapter 13, which governs public records and proceedings.

A. Before beginning a program evaluation under this chapter that may require access to records containing confidential or privileged information, the office shall furnish a written statement of its determination that it is necessary for the office to access such records and consult with representatives of the state agency or other entity to discuss methods of identifying and protecting privileged or confidential information in those records. During that consultation, the state agency or other entity shall inform the office of all standards and procedures set forth in its policies or agreements to protect information considered to be confidential or privileged. The office shall limit its access to information that is privileged or confidential by appropriate methods, which may include examining records without copying or removing them from the source.

B. Documentary or other information obtained by the office during the course of a program evaluation under this chapter is privileged or confidential to the same extent under law that that information would be privileged or confidential in the possession of the state agency or other entity providing the information. Any privilege or statutory provision, including penalties, concerning the confidentiality or obligation not to disclose information in the possession of a state agency or other entity or its officers or employees applies equally to the office. Privileged or confidential information obtained by the office during the course of a program evaluation may be disclosed only as provided by law and with the agreement of the state agency or other entity subject to the program evaluation that provided the information.

C. If the office accesses information classified as privileged or confidential pursuant to state agency or other entity policy or procedures or by agreement, the office shall comply with the state agency's or other entity's standards or procedures for handling that information. The office may include in its working papers the excerpts from information classified as confidential or privileged as may be necessary to complete the program evaluation under this chapter, as long as the use does not infringe on department policies or procedures applicable to the original provision of information.

~~**5. Confidentiality of working papers.** Except as provided in this subsection, working papers are confidential and may not be disclosed to any person. Prior to the release of the final program evaluation report, the director has sole discretion to disclose working papers to the state agency or other entity subject to the program evaluation when disclosure will not prejudice the program evaluation. After release of the final program evaluation report, working papers may be released as necessary to the state agency or other entity that was subject to the program evaluation under this chapter.~~

6. Confidential sources. If data supplied by an individual are needed to initiate, continue or complete a program evaluation under this chapter, the director may, by written memorandum to the file, provide that the individual's identity will remain confidential and exempt from disclosure under Title 1, chapter 13, and this written memorandum protects the identity of the person from disclosure under Title 1, chapter 13, notwithstanding any other provision of law to the contrary.

7. Disposition of final report. A final copy of a program evaluation report under subsection 2, including recommendations and the evaluated state agency's or other entity's comments, must be submitted to the commissioner or director of the state agency or other entity examined at least one day prior to the report's public release, and must be made available to each member of the Legislature no later than one day following the report's receipt by the committee. The office may satisfy the requirement to provide each Legislator a copy of the report by furnishing the report directly by electronic means or by providing notice to each Legislator of the availability of the report on the office's publicly accessible site on the Internet.

SUMMARY

The bill clarifies the law governing the confidentiality of reports, records and working papers of the Office of Program Evaluation and Government Accountability. The bill clarifies that final program evaluation reports are public records and subject to disclosure. With regard to other records and working papers, the bill provides that those working papers and records that support reports or are related to any program evaluation are confidential and may not be disclosed except at the discretion of the Director of the Office of Program Evaluation and Government Accountability in certain circumstances. Prior to the release of a program evaluation report, the bill gives the director discretion to disclose working papers to the agency subject to the evaluation when disclosure will not prejudice the program evaluation and the agency agrees to keep the working papers confidential. After the release of a program evaluation report, the bill gives the director discretion to disclose working papers as necessary and as long as the working papers remain confidential to the state agency subject to the program evaluation or any federal agency providing funding to that agency, to law enforcement agencies for the purposes of criminal investigation, to other state audit agencies and to other auditors reviewing the work of the office.

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**OPEGA Director's Suggested Revisions to Language in LD
2212 are highlighted below**

An Act Concerning Public Records Exceptions

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

Sec. 1. 1 MRSA §402, sub-§3, ¶O, as enacted by PL 2005, c. 381, §3, is amended to read:

O. Personal contact information concerning public employees, except when that information is public pursuant to other law. For the purposes of this paragraph:

(1) "Personal contact information" means home address, home telephone number, home facsimile number, home e-mail address and personal cellular telephone number and personal pager number; and

(2) "Public employee" means an employee of a governmental entity, as defined in Title 14, section 8102, subsection 2 1, except that "public employee" does not include elected officials.

Sec. 2. 3 MRSA §997, as amended by PL 2003, c. 673, Pt. GGGG, §9, is further amended to read:

§ 997. Conduct and issuance of program evaluation reports

The director and the office shall adhere to the following provisions relative to conducting and issuing program evaluation reports under this chapter.

1. Review and response. Prior to the presentation of a program evaluation under this chapter to the committee by the office, the director of the evaluated state agency or other entity must have an opportunity to review a draft of the program evaluation report. Within 15 calendar days of receipt of the draft report, the director of the evaluated state agency or other entity may provide to the office comments on the draft report. If provided to the office by the comment deadline, the comments must be included in the final report when it is presented to the committee. Failure by the director of an evaluated agency or other entity to submit its comments on the draft report by the comment deadline may not delay the submission of a report to the committee or its release to the public.

All documents, writings, drafts, electronic communications and information transmitted pursuant to this subsection are confidential and may not be released to the public prior to the time the office issues its program evaluation report pursuant to subsection 3 3-A. A person violating the provisions of this subsection regarding confidentiality is guilty of a Class E crime.

2. Submission of final report to committee. The director shall issue program evaluation reports, favorable or unfavorable, of any state agency or other entity, and these reports are public records. The director shall notify the committee when each final program evaluation report under this chapter is completed. The report must then be placed on the agenda for a future committee meeting. At the meeting where a report appears on the agenda for the first time, the director will release that report to the committee and to the public simultaneously. The committee, at its discretion, may vote to endorse, to endorse in part or to decline to endorse the report submitted by the director. If the committee determines it is necessary, the committee may report out to the Legislature legislation to implement the findings and recommendations of any program evaluation report presented to it by the office.

3. Confidentiality. ~~The director shall issue program evaluation reports, favorable or unfavorable, of any state agency or other entity, and these reports are public records, except that, prior to the release of a program evaluation report pursuant to subsection 2 or the point at which a program evaluation is no longer being actively pursued, all papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of the director or other entity charged with the preparation of a program evaluation report are confidential and exempt from disclosure pursuant to Title 1, chapter 13. All other records or materials in the possession of the director or other entity charged with the preparation of a program evaluation report under this chapter that would otherwise be confidential or exempt from disclosure are exempt from disclosure pursuant to the provisions of Title 1, chapter 13. Prior to the release of a program evaluation report pursuant to subsection 2 or the point at which a program evaluation is no longer being actively pursued, all papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of the director or other entity charged with the preparation of a program evaluation report are confidential and may not be released or disclosed by the director to the Legislative Council or an agent or representative of the Legislative Council. This subsection may not be construed to prohibit or prevent public access to the records of a state agency or other entity in the possession of the director that would otherwise be subject to disclosure pursuant to the provisions of Title 1, chapter 13. The director shall refer requests for access to those records directly to the state agency or other entity that is the official custodian of the requested records, which shall respond to the request for public records.~~

3-A. Confidentiality of working papers. Except as provided in this subsection, working papers related to reports released pursuant to subsection 2, or that are related to any program evaluation no longer being actively pursued, are confidential and exempt from disclosure pursuant to Title 1, chapter 13. Working papers may not be disclosed to any person, including the Legislative Council or an agent or representative of the Legislative Council. For the purposes of this subsection, "working papers" means all papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of the director or other entity charged with the preparation of a program evaluation report. In accordance with subsection 4, all records or materials in the possession of the director or other entity charged with the preparation of a program evaluation report under this chapter that would otherwise be confidential or exempt from disclosure also remain exempt from disclosure

pursuant to the provisions of Title 1, chapter 13. The director may disclose working papers to the following entities as necessary:

- A. The department, commission or agency subject to the program evaluation;
- B. Federal agencies providing grants to the evaluated entity under paragraph A;
- C. Law enforcement agencies for the purpose of criminal law enforcement or investigations;
- D. Other auditors or evaluators in their work reviewing the office; or
- E. Other auditors existing within State Government.

Prior to the release of the final program evaluation report, the director may only disclose working papers to these entities when disclosure will not prejudice the program evaluation. If working papers are to be released to entities other than the agency subject to the evaluation, the director will notify the agency of the planned release unless to do so would jeopardize an audit or investigation of the entity the working papers are being disclosed to.

Working papers may only be released by the director and entities receiving requests for disclosure of working papers shall refer those requests to the office.

This subsection may not be construed to prohibit or prevent public access to the records of a state agency or other entity in the possession of the director that would otherwise be subject to disclosure pursuant to the provisions of Title 1, chapter 13. The director shall refer requests for access to those records directly to the state agency or other entity that is the official custodian of the requested records, which shall respond to the request for public records.

4. Information available to office. Upon request of the office and consistent with the conditions and procedures set forth in this section, state agencies or other entities subject to program evaluation must provide the office access to information that is privileged or confidential as defined by Title 1, chapter 13, which governs public records and proceedings.

A. Before beginning a program evaluation under this chapter that may require access to records containing confidential or privileged information, the office shall furnish a written statement of its determination that it is necessary for the office to access such records and consult with representatives of the state agency or other entity to discuss methods of identifying and protecting privileged or confidential information in those records. During that consultation, the state agency or other entity shall inform the office of all standards and procedures set forth in its policies or agreements to protect information considered to be confidential or privileged. The office shall limit its access to information that is privileged or confidential by appropriate methods, which may include examining records without copying or removing them from the source.

B. Documentary or other information obtained by the office during the course of a program evaluation under this chapter is privileged or confidential to the same extent under law that that information would be privileged or confidential in the possession of the state agency or other entity providing the information. Any privilege or statutory provision, including penalties, concerning the confidentiality or obligation not to disclose

information in the possession of a state agency or other entity or its officers or employees applies equally to the office. Privileged or confidential information obtained by the office during the course of a program evaluation may be disclosed only as provided by law and with the agreement of the state agency or other entity subject to the program evaluation that provided the information.

C. If the office accesses information classified as privileged or confidential pursuant to state agency or other entity policy or procedures or by agreement, the office shall comply with the state agency's or other entity's standards or procedures for handling that information. The office may include in its working papers the excerpts from information classified as confidential or privileged as may be necessary to complete the program evaluation under this chapter, as long as the use does not infringe on department policies or procedures applicable to the original provision of information.

5. Confidentiality of working papers. ~~Except as provided in this subsection, working papers are confidential and may not be disclosed to any person. Prior to the release of the final program evaluation report, the director has sole discretion to disclose working papers to the state agency or other entity subject to the program evaluation when disclosure will not prejudice the program evaluation. After release of the final program evaluation report, working papers may be released as necessary to the state agency or other entity that was subject to the program evaluation under this chapter.~~

6. Confidential sources. If data supplied by an individual are needed to initiate, continue or complete a program evaluation under this chapter, the director may, by written memorandum to the file, provide that the individual's identity will remain confidential and exempt from disclosure under Title 1, chapter 13, and this written memorandum protects the identity of the person from disclosure under Title 1, chapter 13, notwithstanding any other provision of law to the contrary.

7. Disposition of final report. A final copy of a program evaluation report under subsection 2, including recommendations and the evaluated state agency's or other entity's comments, must be submitted to the commissioner or director of the state agency or other entity examined at least one day prior to the report's public release, and must be made available to each member of the Legislature no later than one day following the report's receipt by the committee. The office may satisfy the requirement to provide each Legislator a copy of the report by furnishing the report directly by electronic means or by providing notice to each Legislator of the availability of the report on the office's publicly accessible site on the Internet.

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STATE OF MAINE

ONE HUNDRED AND TWENTY-THIRD LEGISLATURE

COMMITTEE ON JUDICIARY

March 20, 2008

TO: Sen. Elizabeth Mitchell, Senate Chair
 Rep. Marilyn E. Canavan, House Chair
 Government Oversight Committee

FROM: Sen. Barry J. Hobbins, Senate Chair *BJH*
 Rep. Deborah L. Simpson, House Chair *DS*
 Joint Standing Committee on Judiciary

Re: LD 2212, Public records exceptions; OPEGA statute

The Right to Know Advisory Committee, pursuant to Title 1, section 432, submitted a report to the Judiciary Committee in January that proposed several changes to confidentiality statutes, and identified other confidentiality provisions that could benefit from further review by the Judiciary Committee. The Advisory Committee recommended correcting the ambiguity in the current law that addresses confidentiality of records of the Office of Program Evaluation and Government Accountability.

LD 2212 contains a revision of the OPEGA confidentiality laws that is intended to clarify that working papers are confidential, consistent with the informal advice provided by the Office of the attorney General to OPEGA. Although much of section 2 of LD 2212, amending Title 3, section 997 is underlined, the majority of that "new" language can be found in the current subsections 3 and 5, which were combined into new subsection 3-A.

OPEGA director Beth Ashcroft provided the Judiciary Committee with redrafted language at the Public Hearing on LD 2212, and responded to questions and concerns and returned to the work session with further refinements. We understand the need to clarify ambiguous and conflicting statutes, and we recognize that policy issues can also be addressed through the clarification process.

The Judiciary Committee does not intend to make recommendations for changes to the OPEGA statutes without the participation of the Government Oversight Committee,

especially if proposed amendments may result in policy decisions away from Attorney General interpretations of the current law. We are requesting that your Committee review the proposed changes and report back to us your recommendations. If this is an issue that will need more discussion than this legislative session can accommodate time-wise, let us know and we can remove the section from our discussions.

We appreciate your attention to this matter. Please do not hesitate to contact us or our staff if you have questions or need more information.

Thank you.

cc: Beth Ashcroft, Director, OPEGA



SEN. ELIZABETH H. MITCHELL, CHAIR
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MAINE STATE LEGISLATURE
GOVERNMENT OVERSIGHT COMMITTEE

To: Senator Barry Hobbins, Senate Chair
Representative Deborah Simpson, House Chair
and Members of the Joint Standing Committee on Judiciary

From: Senator Elizabeth Mitchell, Senate Chair *EM*
Representative Marilyn Canavan, House Chair *MC*
Government Oversight Committee

Date: April 2, 2008

Re: LD 2212

The Government Oversight Committee has received your request for input on proposed changes to the language in 3 MRSA §997 regarding the confidentiality of OPEGA's workpapers. We appreciate the opportunity to comment and are very interested in reviewing the possible statutory changes and related policy issues.

We do believe, however, that an appropriately thorough discussion of these issues requires more attention than the Committee has to give to it before the end of session. Consequently, we respectfully request that you remove proposed changes to OPEGA's statute from LD 2212 and refer the matter to the Government Oversight Committee for further review. Legislation to accomplish statutory changes deemed necessary by the Committee could be introduced in the first session of the 124th Legislature.

Thank you.

Cc: Margaret Reinsch, Senior Analyst, Office of Policy and Legal Analyst
Members of the Government Oversight Committee
Beth Ashcroft, Director, Office of Program Evaluation and Government
Accountability

Possible Language for Change to OPEGA Statute to allow public disclosure of OPEGA working papers upon approval of the GOC

After the final report is released, those working papers necessary to support the conclusions and findings in the final report may be released to entities other than A-E above upon approval of a majority of the members of the committee following review of a written request. The committee will make its determination within 30 days of receipt of the written request. Only the specific work papers that the committee votes to approve for disclosure shall be released. Work papers that have not been specifically approved for disclosure by a majority vote of the committee shall remain confidential.

How This Language Would Be Incorporated Into Proposed Changes Currently Before the Judiciary Committee

3 MRSA §997

3-A. Confidentiality of working papers. Except as provided in this subsection, working papers related to reports released pursuant to subsection 2, or that are related to any program evaluation no longer being actively pursued, are confidential and exempt from disclosure pursuant to Title 1, chapter 13. Working papers may not be disclosed to any person, including the Legislative Council or an agent or representative of the Legislative Council. For the purposes of this subsection, "working papers" means all papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of the director or other entity charged with the preparation of a program evaluation report. In accordance with subsection 4, all records or materials in the possession of the director or other entity charged with the preparation of a program evaluation report under this chapter that would otherwise be confidential or exempt from disclosure also remain exempt from disclosure pursuant to the provisions of Title 1, chapter 13. The director may disclose working papers to the following entities as necessary:

- A. The department, commission or agency subject to the program evaluation;
- B. Federal agencies providing grants to the evaluated entity under paragraph A;
- C. Law enforcement agencies for the purpose of criminal law enforcement or investigations;
- D. Other auditors or evaluators in their work reviewing the office; or
- E. Other auditors existing within State Government.

Prior to the release of the final program evaluation report, the director may only disclose working papers to these entities when disclosure will not prejudice the program evaluation.

After the final report is released, those working papers necessary to support the conclusions and findings in the final report may be released to entities other than A-E above upon approval of a majority of the members of the committee following review of

a written request. The committee will make its determination within 30 days of receipt of the written request. Only the specific work papers that the committee votes to approve for disclosure shall be released. Work papers that have not been specifically approved for disclosure by a majority vote of the committee shall remain confidential.

Working papers may only be released by the director and entities receiving requests for disclosure of working papers shall refer those requests to the office. If working papers are to be released to entities other than the agency subject to the evaluation, the director will notify the agency of the planned release unless to do so would jeopardize an audit or investigation of the entity the working papers are being disclosed to.

BETH L. ASHCROFT
DIRECTOR



MAINE STATE LEGISLATURE
OFFICE OF PROGRAM EVALUATION AND
GOVERNMENT ACCOUNTABILITY

July 31, 2007

Linda Pistner
Chief Deputy Attorney General
Attorney General's Office
6 State House Station
Augusta, Maine 04333-0006

Dear Linda:

I am requesting the Attorney General's opinion on the following questions in regards to 3 MRSA §997(5).

1. Do OPEGA's working papers remain confidential (i.e. not subject to FOIA) even after the final report on an audit project is released to the Government Oversight Committee?
2. Do I, as Director of OPEGA, have the discretion to make work papers available to persons other than the entity that was subject to audit after the final report has been released?
3. If I share work papers with persons representing the audited entity as allowed under statute, are they required to maintain the confidentiality of those documents even after the final report is released?

In regards to Question #1, you and I have discussed this subject before and I have a March, 2005 email from you concurring with my interpretation that the answer to that question is "Yes". I also have a September 23, 2005 AG Opinion on OPEGA Access to Privileged and Confidential DHHS CPS Files that references §997(5) saying that "*Working papers, defined broadly by §992(7) to include everything that is received by OPEGA, are themselves confidential and may not be disclosed to any person other than the agency that supplied them.*" Despite this, I feel it would be worthwhile to have an official opinion that addressed this question directly as I occasionally receive requests for documents and files that I consider to be confidential and get challenged when I say I am not required to provide them.

I know that it is some amount of work for you to develop an official opinion, but given that I currently have a media representative asking for certain work papers I would appreciate a response as soon as possible.

Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Beth L. Ashcroft".

Beth L. Ashcroft
Director

Linda Pistrot's Response

1. Do OPEGA's working papers remain confidential (i.e. not subject to FOAL) even after the final report on an audit project is released to the Government Oversight Committee?

Confidentiality of working papers has two purposes: 1) the protection of records obtained from an agency under evaluation that are confidential in the agency's hands; and 2) protection of the thought processes of the auditors reflected in records created before conclusions are reached. With respect to protection of information confidential in the agency's hands, the OPEGA statute gives the OPEGA Office access to confidential records held by agencies for purposes of a program evaluation, without giving access to members of the Governmental Oversight Committee, the Legislative Council, or individual legislators. Steps are taken to protect the confidentiality of records through, for example, the procedures outlined in § 997(4).

As a matter of statutory construction, the language in § 997(5) is pretty unambiguous on its face: working papers are confidential and may not be disclosed to any person. While the standard for release of working papers differs depending on whether release is prior to or subsequent to issuance of OPEGA's report, in both situations the only party to whom working papers can be released is the agency or entity under evaluation. Working papers are also broadly defined in § 992(7) to include all documents and other information acquired, prepared or maintained by the OPEGA Office during the conduct of an evaluation.

Because the statute is clear on its face, a reviewing court would not necessarily look at the legislative history in construing the statute. If it did, however, the history is significant because the Legislature amended the bill after it was out of committee to strengthen the confidentiality provisions regarding the disclosure of working papers, particularly prior to the completion of a report. This history will be detailed in the final opinion.

2. Do I, as Director of OPEGA, have the discretion to make work papers available to persons other than the entity that was subject to audit after the final report has been released?

The OPEGA law makes a distinction between the release of working papers before a report is completed (or work toward one ceases) and their release after the report has been issued. In many contexts where the period preliminary to an event (issuance of a report or other decision, for ex.) is treated differently from the period following that event, the records are then made public in the latter period. The OPEGA law does not follow this pattern. "Prior" to the report, the Director has the sole discretion to release working papers to the agency/entity under evaluation when disclosure will not prejudice the evaluation. "After" the report is issued, working papers can be released "as necessary"—and while it doesn't say in the sole discretion of the Director, this would appear to be the kind of decision that the Director would control as head of the agency—but release is still only permitted to the agency/entity under evaluation.

As the head of the agency charged with implementation of the OPEGA statute, the Director's interpretation of the statute is generally given deference by a reviewing court. That deference would not, of course, apply to the interpretation of confidentiality statutes outside of the OPEGA statute, such as those located in the statutes of the agency/entity under evaluation; protection of

records made confidential by these other statutes would have to be protected in any event. But even to the extent that this is not the case, the web of confidentiality provisions in the OPEGA law is so comprehensive that it is difficult to find latitude to permit discretionary disclosure to other than the agency under evaluation. Legislation would be the safest path to take if release to other parties is intended to be permitted.

3. If I share work papers with persons representing the audited entity as allowed under statute, are they required to maintain the confidentiality of those documents even after the final report is released?

The OPEGA statute does not directly address this issue. Some statutes that make records confidential but permit release to certain agencies specify that they remain confidential in the receiving agency's hands. If that is the intent here, it is certainly better to provide that expressly in the OPEGA statute.

Looking at the current language of the statute, a good argument can be made that the working papers are intended to be confidential in the hands of the receiving agency. The carefully constructed confidentiality provisions in the OPEGA statute as a whole suggest that read in context, the provisions allowing release of working papers only to the agency under evaluation is intended to restrict their release, both pre- and post-report. By comparison, statutes which require confidentiality of documents during an investigation often state that upon, *inter alia*, conclusion of an investigation, issuance of a notice of hearing, or closing a file, that the records then become public.

However, the FOAL does have language requiring it to be construed in favor of access, and courts are inclined to take that very seriously when agency records (as distinguished from private business records in agency files) are involved. As a result, it is difficult to predict with any certainty how a court would respond if a denial of access to working papers in the hands of an agency were challenged.