



SEN. EMILY ANN CAIN, SENATE CHAIR  
REP. CHUCK KRUGER, HOUSE CHAIR

**MAINE STATE LEGISLATURE  
GOVERNMENT OVERSIGHT COMMITTEE**

**MEMBERS:**

SEN. ROGER KATZ  
SEN. DAVID C. BURNS  
SEN. MARGARET M. CRAVEN  
SEN. CHRISTOPHER K. JOHNSON  
SEN. EDWARD M. YOUNGBLOOD  
REP. PAUL T. DAVIS, SR.  
REP. ANDREA M. BOLAND  
REP. H. DAVID COTTA  
REP. LANCE E. HARVELL  
REP. MATTHEW J. PETERSON

**Meeting Summary  
February 21, 2014  
Accepted February 28, 2014**

**CALL TO ORDER**

The Chair, Rep. Kruger, called the Government Oversight Committee to order at 9:20 a.m. in the Cross Office Building.

**ATTENDANCE**

Senators: Sen. Katz, Sen. Burns, Sen. Craven, Sen. Johnson, and Sen. Youngblood  
Joining the meeting in progress: Sen. Cain

Representatives: Rep. Kruger, Rep. Davis, Rep. Boland, and Rep. Cotta  
Joining the meeting in progress: Rep. Harvell and Rep. Peterson

Legislative Officers and Staff: Beth Ashcroft, Director of OPEGA  
Etta Connors, Adm. Secretary, OPEGA

Executive Branch Officers and Staff Providing Information to the Committee: Phyllis Gardiner, Sr. Attorney, General Division Chief, Office of the Attorney General  
Brenda Kielty, Ombudsman, Office of the Attorney General

**INTRODUCTION OF GOVERNMENT OVERSIGHT COMMITTEE MEMBERS**

The members of the Government Oversight Committee introduced themselves for the benefit of the listening audience.

**SUMMARY OF THE JANUARY 24, 2014 GOC MEETING**

The Meeting Summary of January 24, 2014 was accepted as written. (Motion by Sen. Craven, second by Rep. Cotta, unanimous vote 9-0)

## NEW BUSINESS

- **Presentation of OPEGA Annual Report for 2013**

Director Ashcroft presented OPEGA's Annual Report for 2013.

The GOC thanked Director Ashcroft for the Report presentation and OPEGA for their work for the Committee over the past year.

- **Discussion of Concerns Raised in Resignation Letter of Former Bureau of General Services Employee**

Chair Cain said this item is not a formal request for an OPEGA review, but information for the Committee to review. She noted that the Department of Administration and Financial Services (DAFS) has taken quick action regarding the matters addressed in the letter.

Director Ashcroft said OPEGA has been in contact with DAFS regarding their response to the resignation letter addressed to Sawin Millett, Commissioner, DAFS. She understands they have started two internal reviews or investigations. One review is related to human relations matters that they cannot discuss with OPEGA. The second is an internal audit that seeks to validate some of the information contained in the resignation letter with regard to the way savings might, or might not, be negotiated on projects, design and architectural work in particular. DAFS expects their reviews to take three to four weeks to be complete. In the past, the Department has been willing to come before the GOC to give a briefing of their results of such reviews.

Sen. Johnson noted the letter referred to a project placed at risk due to delayed action on the part of a supervisor and asked if DAFS was examining those kinds of decisions. Director Ashcroft did not know if it was in DAFS' first review. Sen. Johnson wanted to make sure they were proactively trying to avoid such losses and problems from occurring.

Chair Cain said the GOC would want to be kept apprised to DAFS' review of the issues raised in the letter. Director Ashcroft will check with DAFS to confirm that they will be willing to come to a GOC meeting when they have completed their work for the purpose of briefing the Committee on the results.

## UNFINISHED BUSINESS

- **Report on Healthy Maine Partnerships' FY13 Contracts and Funding**

- **Committee Work Session Continued**

Chair Cain said the GOC sent letters of invitation to Dr. Sheila Pinette, Director, Maine Center for Disease Control and Prevention (MCDC); Christine Zukas, Deputy Director, MCDC; Debra Wigand, Director, Division of Population Health, MCDC; Andrew Finch, Sr., Program Manager, Division of Population Health, MCDC; Lisa Sockabasin, Director, Office of Health Equity, MCDC; and Sharon Leahy-Lind, former Director, Division of Local Public Health, MCDC. She noted that the only person who agreed to come to the meeting was Sharon Leahy-Lind and the others declined the invitation.

Director Ashcroft said the DHHS employees had received a communication from Kevin Wells, General Counsel, DHHS, stating that they were allowed to attend the GOC meeting, but they were not authorized to speak on behalf of the Department or MCDC. Chair Cain noted that the email also included a statement that if the employee did attend the meeting, that employee was to use their own personal time. Director Ashcroft said that seemed to be implied in the email, depending on how you read it. One of the MCDC employees noted that whatever they would have to say to the GOC was in their capacity as an employee of MCDC and they did not

have any personal opinions to offer. Based on what the DHHS had sent for a message, it seemed employees felt that attending a meeting voluntarily might not be in their best interest.

Chair Cain said the Committee decided at its last meeting that in order to complete its work, they need to talk with people who could answer their questions about documents, timing, etc. so the GOC can make recommendations on what steps need to be taken to ensure this kind of thing does not happen again. The Committee still needs that information and because the invitations were declined except by one, the GOC needs to find another way to get there.

Rep. Harvell said he supported sending the invitations, but thought those who did attend would be represented by a lawyer and the GOC would not get any information from them. The matter is involved in a civil suit and he does not believe the GOC has the ability to grant immunity to individuals to compel them to answer questions. Chair Cain said the Committee has the ability to put people under oath, and they have a right to have their attorney with them. She said it was important to point out that the GOC would not be deciding anything in the civil or a criminal case.

Chair Cain noted that the GOC had also received a letter from the attorney representing DHHS in the civil suit asking that the GOC wait to make further inquiry until the civil suit ended.

Sen. Katz thought the GOC has three choices:

1. can decide to do nothing;
2. can delay it until the end of the civil case; or
3. can move ahead and go into an investigatory mode and issue subpoenas for the folks to appear.

Doing nothing was not an option for him, and he does not think waiting for the end of the civil case is the right thing to do either. He said the GOC has a public interest in getting to the bottom of the matter and waiting for the end of the civil case, could drag on for years. The questions for him are: were documents shredded in violation of law; and were the contracts awarded in a proper way. OPEGA staff have found smoke there and the people who know what happened are not anxious to talk with the GOC. So unless subpoenas are issued, the Committee will never know what happened. He would be in favor of issuing the subpoenas. Sen. Katz agreed that the GOC did not have the authority to grant immunity. A person subpoenaed has the right to claim their 5<sup>th</sup> Amendment right and that question will not get answered, but beyond that, if they are under oath, just saying they don't think they have to answer that question would not be an acceptable answer. He worries about what kind message the GOC is sending if they don't move forward.

Rep. Harvell agreed there was a three prong approach, but asked if anyone on the Committee thought the individuals subpoenaed would provide any information. Sen. Katz said those subpoenaed will have an opportunity to go to Court to try to quash the subpoena, but if the subpoena is not quashed, that person will appear at the GOC meeting, be placed under oath and the Committee will have the opportunity to ask questions and the individual will have the opportunity to respond to those questions.

Chair Cain noted that the GOC was talking about understanding what happened and in order to do that, they need those people to come to a meeting and to tell members the truth. It is her opinion that the truth should be the same whether you are sitting at a GOC meeting, are dealing with a court matter, or just talking with your attorney. The GOC is not trying to weigh in or determine any legal proceeding, but is trying to meet its responsibility.

Director Ashcroft clarified that there are a number of questions the GOC has about the process and decisions made that are different than the charges in the civil suit. While there may be some questions Dr. Pinette feels she cannot answer, Director Ashcroft thinks there is a reasonable chance that there are some questions that she and others would respond to. The matters the GOC is pursuing are not exactly the same as those in the civil suit.

Rep. Cotta agreed and said if the Committee could, through the Chairs, develop a series of questions of exactly what information they were seeking answers to, he would agree to move forward.

Chair Cain noted that the GOC would not be subpoenaing individuals for the February 28, 2014 meeting, but will make sure there is sufficient time for the Committee to have a well-defined process with clear articulated goals and scope to make sure they are handling it with the utmost of professionalism.

Sen. Burns found the situation somewhat convoluted and said he could not imagine State employees being put in the current situation. To have been told that if they go to a governmental body and talk about something that happened during their official capacity as a State employee they were not to in anyway represent the Department. What he wants to hear from the employees is what happened during the course of their responsibility as a State employee. If those employees cannot do that, he does not want to bring them to a meeting to talk about their personal opinions. Sen. Burns said with all of the inquiries made by the GOC in the past, he did not remember a Department taking this type of position before. He thought people would have come in response to the GOC's invitation and they would have come in their official capacity to tell what happened in the course of their duties. What jeopardy are they in after receiving the caution from the Department's attorney?

Sen. Craven said the GOC had this topic before the civil suit began and the civil suit should have nothing to do with it. The GOC is talking about MCDC, an agency that is funded with public money, and therefore, transparency is needed. She thinks that is all the GOC is asking for and it is also an opportunity for the MCDC to clear their name as well. She continues to receive letters encouraging the Committee to continue to look at issues within DHHS.

Chair Kruger said it is the GOC's job to maintain the trust of the government and just because the GOC received a letter from a lawyer the Committee cannot walk away from their responsibility. The GOC is not a courtroom, but they can get answers to some of their questions.

Sen. Johnson said he appreciates the unique situation of a Department taking a position that the employees can't testify except on their own and cannot represent the Department. He understands that the Department would not want employees representing the Department's policy positions, but this is implying that employees cannot come and speak as to their role, decisions, involvement and knowledge in their roles within the Department in which they are employed. The GOC needs to know the truth and they simply cannot ask someone else in the Department that was not there to give a firsthand account of what transpired. He feels there are several inappropriate things suggested in the responses and emails received declining the GOC's invitation to attend a meeting. He also noted in the letter from the Department's attorney referenced that there had been several internal and impartial investigations conducted within the Department on those matters but none of that was shared with the GOC in the course of their discussions with the Department, and he finds that inappropriate as well. He thinks the GOC needs to continue to pursue the matter and be able to ask questions to the people involved.

Rep. Davis did not think any member of the Committee wanted to abandon their responsibilities of bringing accountability, but it is more of a discussion of how to get to the end and what means do they use to get there. He could not see any attorney allowing his client to testify on something that is pending, or anyone getting sued to testify in such a manner. There are going to be depositions taken in the civil suit and he does not know if that becomes public record or not, but if it does, that might be something the GOC could get without subpoenaing people.

Rep. Boland noted that if the GOC makes decisions about what to look at, or not to look at, based on presumptions of what they think they will hear, what people would be willing to say, they could be making a mistake.

Rep. Harvell asked what was going to happen next if the individuals subpoenaed came before the GOC and did not answer questions. If that should happen, the Committee should have its next step of action in place prior to that.

Director Ashcroft said for those members of the Committee who have not been through this process before, there are a couple of statutes that govern what they would be entering into for a role and within those statutes there are provisions for how the Committee would conduct itself and how they might respond to various situations that would arise in questioning a witness. There are some technicalities that would need to be understood further. OPEGA has been in consultation with the Attorney General's Office as they prepared to support the GOC in this matter, for example, pleading the 5<sup>th</sup> relates to criminal matters. The witness could offer an objection that they don't want to answer the questions, but under the investigating Committee statute that would govern the proceedings, the Chair has the authority to direct them to answer. They could plead the 5<sup>th</sup> if there was a potential criminal charge, but that does not mean that every answer to every question can be I am pleading the 5<sup>th</sup>. There are a lot of questions that are just about when you did this, what was the thinking behind that, etc. She agreed with Rep. Harvell that the GOC would need to be prepared for how to respond to various situations that might come up.

Sen. Katz said Rep. Harvell raised good points but he did not want to assume that anybody is going to a meeting and claim their rights under the 5<sup>th</sup> Amendment. The meeting could go in a variety of different ways and for the GOC to try to figure out now how it will react depending on how it goes, is not a fruitful thing to be doing. They will have to deal with it as they go along. He suspects that most of those subpoenaed will answer most of the questions and the Committee will be a lot further along on its mission, which is to figure out what happened. The alternative would be to say the GOC did not have a way to effectively do that and fold its tent and go home. He thinks that is the last thing the Committee should do.

Sen. Youngblood said he was also concerned about the letter from DHHS' General Counsel telling State employees that they cannot represent the Department. It also makes him equally concerned that if the Committee does not proceed that people down the road will say here is a way not to go before the GOC. If the GOC decides to move forward what they are doing is putting an immense amount of faith in the Chairs' of the Committee to say that they can control what the GOC is doing, the questions that get answered, the demeanor in which they are asked and answered. It makes him feel more comfortable knowing that the GOC Chairs will keep everybody in line.

Sen. Burns wanted to clarify that he was not in favor of walking away, or not fulfilling the GOC's goals, but he wants clarity. If the Committee is going to bring people before them, he would like clarification from DHHS that employees are going to be able to talk about what they did in their official capacity without repercussion. He has been a member of the GOC for six years and he does not recall this happening before. He also thought the Committee should have written questions prepared beforehand so they know what areas they are going to pursue.

Sen. Katz referred to the email from DHHS' General Council sent to employees and specifically to the section telling them they could not speak for, or represent, DHHS or MCDC in any capacity and that their attendance would only be in their personal capacity. He was not bothered by that because the GOC is going to be asking individuals what happened, who said what and when and what were the events that transpired. He did not care if they testified in their individual capacity, or as a representative of the DHHS, the questions are going to be the same and presumably the answers will be the same. Sen. Katz thought the message meant that the employee could not speak about the Department's position on a particular issue, but in terms of what did you hear or say and what did you hear other people say - if they answer in their individual capacity, that should be fine with the GOC. He is troubled, however, by the fact that they were told if they attend the meeting they have to take vacation time to do it, but that is a separate issue.

Director Ashcroft said that should the GOC subpoena people it would be clear they are expected to be there, expected to tell the truth and it is done in a public forum. She would hope that would give some measure of

protection against the agency taking any actions as repercussions or retaliations against them and would allow them to take advantage of whistle blower protection laws, etc.

Sen. Johnson said it is appropriate for the Department to say that a person coming before the Committee cannot speak in their official capacity for the Department, but he is not clear, based on how the letter is written, that they would be free to speak and not under a gag regarding what occurred while they were acting in their official capacity. That is a different matter to him. It is not the Department's position on what happened, it is their answering truthfully of their personal observation and knowledge of what occurred. It is not that the Department supports that conclusion, or the version of the facts. He thinks that it is important that the GOC takes a stand that it would not be appropriate if that was the intent of letter.

Chair Cain said she wanted to remind Committee members that the GOC is already an investigatory committee so unlike other committees of the Legislature they do not have to take a vote to become an investigatory committee. As mentioned by Director Ashcroft, there are several areas of statute that govern what the GOC is doing. There is the OPEGA statute, Freedom of Access and the Legislative Investigative Committee Statute. The Committee would have to take a vote in order to subpoena the people the GOC would like to come before them. She thinks the Committee would be talking about a subpoena that would require them to appear and to produce any documents they might have related to the relevant criteria, or other factors, that were considered and used in the HMP selection process, or in the scoring, including any versions of the scoring materials or emails that discussed the criteria scoring or other considerations. The GOC would subpoena the same people that received invitation letters, Dr. Pinette, Christine Zukas, Debra Wigand, Lisa Sockabasin, Andrew Finch and Sharon Leahy-Lind. The scope would be to further obtain information that was contained in, and issues and concerns arising from OPEGA's Healthy Maine Partnerships' FY13 Contracts and Funding Report in relation to MCDC's decisions to change the structure for the delivery and funding for the HMP, the process used and decisions made in selecting the lead HMP and the maintenance of documentation supporting that effort. The Committee is specifically getting the information in order to decide what their next steps and recommendations would be to State government, the Legislature and Executive Branch based on the GOC's work. This information would be for just what is in OPEGA's Report and not in the civil suit. It is not the Committee's cause or interest to try the civil suit, and is not a body that would determine whether or not there was criminal activity. The GOC's purview is the transparency, accountability and workings of the State government where it is clear from the Report that something went wrong and they are trying to determine what it was so it can be prevented from happening again.

Rep. Cotta asked for partisan caucuses. Chair Cain put the Committee at ease for that purpose.

Following the caucuses Chair Cain said the Committee would decide whether to issue subpoenas to the individuals mentioned above to appear before the GOC. She suggested they appear before the Committee on March 14, 2014 and asked members if there was any objection to that date.

Rep. Cotta asked if the scope could be defined and areas of interest outlined prior to March 14<sup>th</sup>. Chair Cain said the Committee could do that at their February 28, 2014 meeting.

**Motion:** That the Government Oversight Committee moves to issue subpoenas to Dr. Pinette, Christine Zukas, Debra Wigand, Lisa Sockabasin, Andrew Finch and Sharon Leahy-Lind to attend the Government Oversight Committee meeting on March 14, 2014. (Motion by Sen. Craven, second by Rep. Harvell, passed unanimous vote 12-0).

Director Ashcroft said she will draft the subpoenas and will make arrangements for them to be delivered. Along with the subpoena, individuals will receive a copy of the relevant statutes that will be governing the GOC's proceedings. Chair Cain asked that the Director provide links to the statutes to the Committee members prior to their next meeting.

Chair Cain said the Committee had another item to discuss related to OPEGA's Report. They had questions at the last meeting about FOAA requests and records retention. Chief Deputy Attorney General Linda Pistner prepared a letter for the GOC of what might be worthwhile next steps.

Chair Cain recognized Phyllis Gardiner, Sr. Attorney General and Brenda Kielty, Ombudsman, Attorney General's Office.

Attorney Gardiner said there is a strong connection between FOAA and record retention, but they are distinct issues, as is document creation. The first issue is what documents you have to create surrounding a certain agency decision or process. The second issue is how long do you have to retain them and the third issue is producing them, if and when, you receive a FOAA request. She said the AG's Office started its initial work about a year ago of looking at the issues in their own office that are not well addressed in existing records retention guidance and the guidance about draft documents and what documents have lasting significance that need to be kept.

Attorney Kielty said she is primarily focused on FOAA, but records retention is critical to FOAA because without good records retention policies and implementation FOAA becomes meaningless. If the records don't exist, you cannot get access to them. She works a lot with Tammy Marks, Director of Records Management at State Archives, looking at general issues around how to make sure that the records retention is solid and consistent so when a FOAA is received those records are accessible and produced.

Attorney Kielty thought the GOC also wanted information on what a draft is, how that fits into the retention schedule and how that works with FOAA. There is very limited guidance relating to retaining draft documents. There could be clearer guidance and more information to help State employees determine what they need keep. She was asked by the Right-to-Know Advisory Committee to look at the question of draft documents so Director Marks and she had already been taking a look at where that stands and what could be done. She said that is not a simple question because it means different things to different people. There are many different documents that could be captured by that term so the term creates an initial confusion that needs clarification. After they reviewed the language that exists and guidance from the National Archives, it became clear that there needs to be an analysis in order to determine, whether you call it a draft or not, what needs to be retained and for how long. Attorney Kielty said the definition of public record is very broad and the policy is to interpret FOAA broadly, so if a document has anything to do with the transaction of official business, FOAA is going to say that is a public document. If it is in question, she would say consider it a public document.

Attorney Kielty said records retention does not use the same terminology or define records in the same way. If you are looking at a very mechanical application of a records schedule that may not be sufficient from FOAA's standpoint. FOAA might still think that document has something to do with official business, it needs to be retained. That is a gray area that is not easy to clarify. From FOAA's point of view, pretty much anything that has to do with your official business is going to be public. There is an analysis in place that is a very standard analysis that is used by records managers across the country that looks at a four prong value criteria in order to determine how long a document should be retained. The four points are:

1. The administrative use of the document.
2. Any legal requirements that affect how long or how a document needs to be retained.
3. Any fiscal requirements that might apply to the document. For example, the transaction might be subject to an audit at some time in the future and, therefore, there are fiscal requirements for retention.
4. The historical or research value of the document.

Attorney Kielty said in records retention schedules the criteria are applied to determine how a record should be retained and for how long. Looking at the spectrum of what you could have, you could have a document with extraordinary historical significance that should be retained permanently. A document that is meet you at lunch today at 12:00 is transitory, administrative and has low value according to the criteria and perhaps does not need to be retained. When talking about drafts it is not going to be a simple question of all drafts of any sort should be retained for "x" period of time, or drafts should never be retained. She said her research around this project

regarding drafts is not complete so she could not make a recommendation of how it should be approached. Ms. Kielty thinks they are looking at something more than a definitional solution that is instead going to require the application of an analysis, and some judgment on part of the custodian of the record, which is pretty much the case already with records retention. It needs to be made clearer that drafts are not necessarily something you can dispose of or that you have to keep forever, but you have to apply the analysis to them also.

Chair Kruger asked if copies of State documents also lived in the server farm at the Office of Information Technology such that they could be retrieved in response to a FOAA. Attorney Kielty said there is a server that OIT maintains that has copies of electronic documents including emails. He asked if a Department destroys a document would it not still exist in the servers. Attorney Kielty said it could. She would want an OIT expert to explain how that works to the GOC. She said it was important to recognize that the server back-up tapes are part of a disaster recovery system and not a records management system. It is not necessarily easy or affordable to access that system as a way of retaining and managing public records. It is designed more for a catastrophic failure across State government and is maintained for that purpose.

Sen. Johnson said in the situation the GOC is reviewing here documenting reasons why it was worth making a change to a criteria and having a different working document is something he would think would be of great importance to capture because of its significance in making that decision to change criteria. Attorney Kielty said the government transparency is a criteria because it is very significant and you could consider that as part of the administrative process or another prong that exists on its own - value of government transparency as part of the criteria for looking at whether or not, and what, you do retain.

Attorney Kielty said more work of clearly identifying a process for retaining drafts is ongoing and the AG's Office did some work on the issue as well. She said it may be that the appropriate approach to improvements here is a group forum that brings in a few of the stakeholders on the issue to try to bring clarity and that could be a potential recommendation on the GOC's part. As of now it is two people working on trying to figure out how to make it clearer. Chair Cain said the policy needs to be something that can be implemented or used consistently across State government and that could be a problem. She thinks the four prongs of criteria are perfect and it is likely to require an analysis and judgment by the custodian of the document. The challenge comes in making sure everyone has a clear understanding of how to do that analysis, or how the training is done relating to that analysis, but also making sure that it is not so much that it interferes with the ability to do work. It has to be logical and realistic in how it is implemented because government transparency is the criteria, but it also has to be something that works. That is what the GOC is wrestling with as they understand what happened in this specific case. Attorney Kielty said the four prong value criteria is the best practice for record managers across the country and Maine implements that process in creating schedules and deciding what the retention period should be. She said at this point, they are suggesting that in the world of draft documents there needs to be a little more process applied.

Chair Kruger said the GOC hopes to come out with recommendations or legislation that improves the way FOAA serves the public. Chair Cain said the GOC may want to recommend putting together a convening group to discuss the issue specifically to broaden it from the AG's Office. Attorney Gardiner said the work group could be one idea. She said the AG's Office could be of assistance because the Assistant Attorney Generals work with almost all agencies in State government and are familiar with the nature of the documents that those agencies handle. Also OIT, the Auditor, the records retention folks from the Secretary of State's Office and Attorney Kielty would be a staff level working group. The GOC may want that group to do some work and then report to another committee.

Attorney Kielty noted that the issues have to be addressed from the top to the bottom. If there was a working group convened, looked at the issues and made recommendations, perhaps for example changes to the Archive rules that are issued under the Secretary of State that address retention issues that have come up before the GOC, then there would still need to be a step taken to implement that recommendation. It may include requiring written policies in agencies to clarify, but you are still not there because there are 12,000 State employees, all of whom are creating public records and are essentially responsible for managing those records and producing those records in response to a FOAA request. The responsibility lies with the employee, but you



have to make sure all the other scaffolding is in place in order to be able to expect the employee to know what they have to do with the records retention. Attorney Kielty said it was an across the board kind of jump, both with the records retention issues and the FOAA issues.

Attorney Kielty noted that the Secretary of State recently issued a memo to all State employees about the policy that covers all State employees regarding the procedures for managing emails that requires each employee review the materials that are presented and sign off on a certificate and submit that. There has been little activity on that. Even though the policy has been addressed directly to the employee and the employee has been asked to do something, again people are working hard and perhaps records retention or FOAA is not at the top of their priority list. Somehow it has to be made a priority. Chair Cain said it has to be easy to use as well. The GOC wants to make it something that adds value to the integrity of State government that does not slow it down and is usable to any State employee at any level. She said the State Archivist said at a previous GOC meeting that one of the big challenges is not necessarily keeping things, because they have OIT and storage, but it is the ability to then find them and who is responsible for retrieving information. She asked who Attorney Kielty would recommend for members of a working group. Attorney Kielty said if it is purely the records retention question, updating the schedules and enhancing the training opportunity, she would suggest people from Audit because their financial requirements are so extensive, OIT, and the AG's Office. That would be a group that could look at all aspects of the retention issues and look at it from top to bottom. Chair Cain asked if that was the Right-to-Know Advisory Committee. Attorney Kielty said the Advisory Committee represents a broader stakeholder group. She said here she is talking about records retention for State government agencies and not addressing municipal government, etc.

Sen. Craven asked if Attorney Kielty could address the idea that had been raised about increasing the authority of the ombudsman position. Attorney Kielty said the role of the ombudsman is primarily focused on informal dispute resolution, problem solving, training and education. The position has only been active since the last quarter of 2012 and then 2013. In 2013, she had over three hundred contacts from citizens who are encountering some difficulty with FOAA, needed information about FOAA, or making inquiries about how FOAA works. That is the bulk of what she deals with. She also has a significant number of inquiries from the press who are interested in knowing how FOAA works or making sure that their requests are being responded to quickly. She receives a significant amount of inquiries from State agencies of people who are trying to comply with FOAA and need assistance or guidance on how to do that. The ombudsman position itself is available to either the requestor or the responding agency of the State, municipal, schools, etc. at any level and also public access to records and public proceedings. The bulk of the contacts that she receives relate to public records and the bulk of the complaints that she looks at have to do with delay. She is providing a great deal of information as a resource to the citizens of the State of Maine to help them with the process and that is a big part of what she does. The inquires that come to her that rise to the level of a true complaint - two parties with a clear dispute and there is an issue that needs to be resolved - is a very small part of what she does. For the most part it is misunderstandings or people need a little facilitation to work out what they are trying to do. There is a very small portion that ought to go to court because there is a legal issue that needs to be resolved or requires some other remedy from what she typically provides. If it appears to be a criminal violation, she can refer that and that is what typically happens in those cases.

Sen. Johnson said it may be worth having an infrequent cycle of review and audit in place within departments for the different positions to make sure there is an appropriate understanding of records retention.

Chair Cain said from a Committee perspective they are trying to decide what recommendation they want to make and to whom. She said the FOAA law is in the purview of the Judiciary Committee, but State Archives falls under the State and Local Government Committee, and OIT is also under State and Local Government, but is also of under all committees as well. She was trying to get a sense of who the GOC should be communicating with from the legislative perspective. Chair Cain said they were looking at a possible GOC recommendation on a stakeholder group to look at the State government side of records retention, training, policy and practice of records retention to look at what is happening now and make recommendations to whoever the right entity would be, what the next steps would be and who would need to take them. She said what she is now hearing Attorney Kielty say is that increasing the authority of the ombudsman might not be the

right place to go because it may undermine the resource nature of the ombudsman role. She asked where the GOC should place that question. Attorney Kielty said the Right-to-Know Advisory Committee has the most experience with forming the structure of the ombudsman and choices were made to focus resources in a certain direction so it seems as though if that were going to be changed, it would be good to go back to the committee that did so much work on that.

Attorney Gardiner said the GOC could recommend the work group address training, policies and accountability, whether every agency has to have a policy on document retention, addressing transparency purposes, and what types of documents need to be created and retained. If the Committee had a recommendation for all State employees you have to make sure they have been trained, received updates and then you have some mechanism of accountability built into that once you have that training requirement and proof of that training requirement embedded in that. The GOC had discussed at prior meetings of communicating with members of the Right-to-Know Advisory Committee at their next meeting and asking that the GOC questions be put on their agenda.

Chair Cain said the GOC talked about a potential scope of a work group and asked if it would be helpful since the Committee is meeting next Friday, to ask Director Ashcroft to write a summary of the potential work group discussions rather than have the GOC take a vote on something that they don't have the same understanding of. Committee members agreed. Director Ashcroft will prepare a summary.

The GOC thanked Attorneys Gardiner and Kielty for the information they provided and for answering the Committee's questions.

#### - **Committee Vote**

The GOC did not take a vote on OPEGA's Healthy Maine Partnerships' FY13 Contracts and Funding Report.

## **RECESS**

The Government Oversight Committee recessed at 11:30 a.m. on the motion of Chair Cain.

## **RECONVENED**

Chair Cain reconvened the meeting at 12:12 p.m.

### • **Re-consideration of Request for OPEGA Review of Matters Pertaining to Unemployment Insurance Appeals and Administrative Hearings**

#### - **Update on status of federal review of unemployment compensation matters**

Director Ashcroft reported that a letter has not yet been received from DOL regarding their investigation. She said at some point the Committee might want to go back and address the request.

### • **Update on GOC Letter to Energy, Utilities and Technology Committee Regarding PUC Matters**

Director Ashcroft said the GOC had sent a letter to the Energy, Utilities and Technology (EUT) Committee asking for their input and asking specifically if any of the issues raised by the GOC were something EUT would be addressing during the session and, if not, were there matters that they were concerned about and did they have any suggestions about what might be the best action. They also asked if it would be appropriate, or would they like, the GOC to provide a legislative vehicle for them to consider any of those matters. The EUT Committee met and their response back to the GOC has been received.

The EUT Committee said they have only one bill before them that would address any of the recommendations in OPEGA's Report and that is LD 1619 *An Act to Amend the Law Governing Conflicts of Interest With Respect*

*to the Public Utilities Commission.* That bill sets up a situation where there are temporary commissioners authorized for the Governor to draw from in the event there are Commissioners that need to recuse themselves in particular matters. The EUT Committee thinks that is an adequate substitute to be considered for some of the recommendations that were put forth and describes how they do not think the other options for changing the makeup of the Commission were worth pursuing.

In response to the GOC's second question of whether any of the matters communicated to them, are concerning to the members of the EUT Committee, EUT said a number of the matters raised in the letter were also concerning to the members of the Committee. They are aware of the debate related to the PUC's consideration of health and safety issues and the pending case at the Commission with regard to smart meter health and safety issues. They believe that the recent Law Court decision that remanded that back to the PUC has made it quite clear that there is an expectation that the PUC will deal with health and safety matters so they do not recommend any clarifications to the PUC's statute at this time.

In response to the third GOC question, and as the members might recall, there was a recommendation to establish a function at the Office of the Public Advocate, where they thought it might best reside, to assist citizens who are trying to appear in proceedings at the PUC, especially *pro se*, to work through the procedural matters. The EUT Committee is interested in that idea and were originally concerned about the fiscal note attached to establish that position, but it appears that the Public Advocate has decided that maybe they have enough funding to do a pilot project around that for the remainder of the biennium so are interested in the GOC providing a legislative vehicle in the form of a bill for them to consider with regard to establishing that. Director Ashcroft has talked with Jean Guzzetti, the OPLA Analyst for the EUT Committee and they are prepared to work together to draft legislation that the GOC could introduce on behalf of the EUT Committee.

Sen. Youngblood said it was the agreement of the entire EUT Committee that there should be some help in the Public Advocate's Office to help people through a difficult process. Not to do anything in way of testifying for them, etc., but to help them work through the process of what they have to do.

Sen. Craven said one of the largest complaints she receives from constituents is the small amount of time they have to be able to review all of the documents they receive from PUC and asked if the EUT Committee had talked about that issue. She said it is difficult to be an intervener if you do not have time to look at the information. Sen. Youngblood said the PUC does generate an enormous amount of paper and it is not just the volume that you try to get through, it is trying to determine the order of it, context, etc. He said there is not a good answer to Sen. Craven's questions. If it is a major issue, the documentation that the PUC receives comes in multiple boxes and they have to pass that information along.

Rep. Boland said part of the problems identified by advocates is that they might submit four or five pages of questions and they get back 250 to 300 pages for an answer. It is the imbalance that makes it difficult. She noted that she was present during EUT's discussion of OPEGA's PUC Report and said Chairman Welch was not at all interested in considering more people on the PUC, which was something the GOC was looking at, or in having a varied background or expertise on the PUC. Rep. Boland said that might be something the GOC may want to consider a little more.

Sen. Burns agreed with Rep. Boland and said he was less concerned about the various backgrounds than he is about the perception of conflict of interest and whether or not there is enough people there to overcome that when somebody has to recuse themselves.

Sen. Youngblood thinks the EUT Committee's discussion centered around three commissioners as that is the model for small states around the country, and if you increase it, you can't increase it by one. He thinks the ultimate bottom line was the cost involved and there have not been that many big cases where Commissioner recusal has been a problem or a bias toward one group or another. There are always people that feel that way, Maine is a small State, and many of the Commissioners appointed will have had contacts with the utilities companies.

Director Ashcroft said she thinks the EUT Committee thinks that if LD 1619 passes it would address the issues of those instances when Commissioners have conflicts and feel they should recuse themselves, so there would be somebody to step in as a temporary commissioner and would create freedom for the sitting Commissioners to recuse themselves knowing there is another temporary Commissioner that was going to be assigned. She said the EUT Committee had quite a bit of discussion regarding having varied qualifications on the Commission and which Commissioner Welch thought might be worth considering. EUT also discussed the role the EUT Committee played in its confirmation of Commissioners and having framework for what factors to consider or questions to ask when Commissioners are being confirmed.

Chair Cain said that for the next meeting the Committee needed to look at the language for the draft legislation recommending an ombudsman position in the Public Advocates' Office. Sen. Youngblood said the Advocate's Office will have funds available because they have a retirement coming up later in the year that is in the budget and funded through the rest of this biennium so could have the dollars to put a person in the position to see how well it worked.

Director Ashcroft said the GOC has gotten the input back that they had requested, and have had some additional communications come in. She thinks now it is a matter of the GOC having a work session and working through what they want to do about the various issues now that they have the EUT Committee's input. The Committee will have to decide what meeting they want that on the Agenda. Chair Cain thought it would be helpful to do that at its next meeting, February 28<sup>th</sup>. Committee members agreed.

- **Update on Status of Draft Tax Expenditure Review Process**

Director Ashcroft said Julie Jones, OFPR Analyst, drafted legislation that the Taxation Committee is currently considering as a Committee amendment to LD 1463. Director Ashcroft attended the Taxation Committee meeting and it appeared members were comfortable with the draft with only some small language changes suggested. Director Ashcroft thinks the Taxation Committee will be voting on LD 1463 at their next work session and if the GOC wants any input on the legislation, Director Ashcroft said now would be the time to do it.

The GOC members asked for a copy of the draft legislation before its next meeting and that it be added to the Agenda so that the GOC members can publicly talk through the legislation to make sure it meets the criteria, particularly the areas that impact OPEGA and the GOC. Director Ashcroft will send the draft out to members and will check with Ms. Jones regarding when it will be scheduled before the Taxation Committee.

## **REPORT FROM OPEGA DIRECTOR**

- **Status of Projects In Progress**

Director Ashcroft said OPEGA's primary priority is the Maine Economic Improvement Fund review. They are also working on the State Lottery review as they have time and continue to have the follow-up review of the Office of Information Technology ongoing.

- **Staffing**

Director Ashcroft said OPEGA filled one Analyst position in December and has advertised for the other Analyst position still open. Those applications are due February 28, 2014.

## **NEXT GOC MEETING DATE**

The next Government Oversight Committee meeting is scheduled for February 28, 2014 at 9:00 a.m.

## **ADJOURNMENT**

Chair Cain adjourned the Government Oversight Committee meeting at 1:34 p.m.