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**STATE OF MAINE
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FIRST REGULAR SESSION**

**Fifth Annual Report
of the
RIGHT TO KNOW ADVISORY COMMITTEE**

January 2011

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EXECUTIVE SUMMARY

This is the fifth annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. The 16 members are appointed by the Governor, the Chief Justice, the Attorney General, the President of the Senate and the Speaker of the House of Representatives. More information is available on the Advisory Committee's website: <http://www.maine.gov/legis/opla/righttoknow.htm>. The Office of Policy and Legal Analysis provides staffing to the Advisory Committee while the Legislature is not in session.

By law, the Advisory Committee must meet at least four times per year. During 2010, the Advisory Committee met four times: May 25, September 23, October 21 and November 18. This year, the Advisory Committee reorganized its Subcommittee structure and appointed three Subcommittees: Legislative, Public Records Exceptions and Bulk Records. All three Subcommittees held meetings and made recommendations to the Advisory Committee.

The Advisory Committee was very fortunate to have the services of two Legal Externs of the Maine School of Law. Mariya Burnell, who received her *Juris Doctor* from the Law School in May 2010, provided research and reports to the Advisory Committee during the Second Regular Session of the 124th Legislature. Sean O'Mara, currently a third year student at the Law School, worked with the Advisory Committee during the first semester of the 2010-2011 school year.

The Advisory Committee serves as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know. In carrying out this duty, the Advisory Committee believes it is useful to include in its annual reports a digest of the developments in case law relating to Maine's freedom of access laws. For the fourth time, this report includes a summary of relevant Maine court decisions.

The report also includes a brief summary of the legislative actions taken since January 2010 in response to the Advisory Committee's recommendations in its fourth annual report.

For its fifth annual report, the Advisory Committee makes the following recommendations:

- Continue, amend and repeal specific existing public records exceptions in Titles 22 to 25;**
- Amend the freedom of access statute to clearly state that all forms of communications, including electronic mail, not be used to defeat the purposes of the freedom of access laws;**
- Retain the existing penalty provisions of the freedom of access laws (do we want to include "no action" recommendations?);**

- Do not address the application of the freedom of access laws to partisan caucuses;**
- Include a simple but noticeable statement on all State webpages that all aspects of communications with the State, including an individual's e-mail address, may be considered public records;**
- Retain the Central Voter Registry System's confidentiality provisions as enacted by Public Law 2009, chapter 564;**
- Amend the freedom of access laws to clarify that Social Security Numbers are not public records (Bulk Records Subcommittee concerns?);**
- Enact legislation governing the participation in meetings by members of public bodies using technology (not unanimous; what to do about FAME, Emergency Medical Services Board, Ethics Commission, Workers' Comp Board comments?);**
- Enact legislation to require records of public proceedings;**
- Enact legislation to expand the scope of the review of proposed public records exceptions to include access issues;**
- Expand FOA training to appointed clerks (Pending Legislative Committee discussion and Advisory Committee discussion)**
- Make improvements to the State's Freedom of Access Website www.maine.gov/foaa;**
- Support establishment of a project to provide FOA services to the public; and**
- Continue work on public records exceptions templates, the Criminal History Record Information Act confidentiality/public access provisions, and the myriad of issues involved in public access to bulk records.**

In 2011, the Right to Know Advisory Committee will continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access and the recommendations of the Advisory Committee for the public records exceptions in Titles 22 through 25. It will continue the process of reviewing the existing public records exceptions contained in Titles 22 through 25. *(Add in any issues that the Advisory Committee tables, including CHRIA, templates, bulk records?)* The Advisory Committee looks forward to a full year of activities and working with the Governor, the Legislature and the Chief Justice of the Maine Supreme Judicial Court to implement the recommendations contained in its fifth annual report.

I. INTRODUCTION

This is the fifth annual report of the Right to Know Advisory Committee. The Right to Know Advisory Committee was created by Public Law 2005, chapter 631 as a permanent advisory council with oversight authority and responsibility for a broad range of activities associated with the purposes and principles underlying Maine's freedom of access laws. Title 1, section 411 is included as Appendix A. Previous annual reports of the Advisory Committee can be found on the Advisory Committee's webpage at www.maine.gov/legis/opla/righttoknowreports.htm.

The Right to Know Advisory Committee has 16 members. The chair of the Advisory Committee is elected annually by the members. The Advisory Committee members are:

Sen. Barry Hobbins Chair	<i>Senate member of Judiciary Committee, appointed by the President of the Senate</i>
Rep. Dawn Hill	<i>House member of Judiciary Committee, appointed by the Speaker of the House</i>
Shenna Bellows	<i>Representing the public, appointed by the President of the Senate</i>
Karla Black	<i>Representing State Government interests, appointed by the Governor</i>
Judy Meyer	<i>Representing newspaper publishers, appointed by the Speaker of the House</i>
Robert Devlin	<i>Representing county or regional interests, appointed by the President of the Senate</i>
Sheriff Mark Dion	<i>Representing law enforcement interests, appointed by the President of the Senate</i>
Richard Flewelling	<i>Representing municipal interests, appointed by the Governor</i>
James T. Glessner	<i>Member of the Judicial Branch</i>
Suzanne Goucher	<i>Representing broadcasting interests, appointed by the Speaker of the House</i>
A.J. Higgins	<i>Representing broadcasting interests, appointed by the President of the Senate</i>
Mal Leary	<i>Representing a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House</i>

Kelly Morgan *Representing newspapers and other press interests, appointed by the President of the Senate*

Linda Pistner *Attorney General's designee*

Harry Pringle *Representing school interests, appointed by the Governor*

Chris Spruce *Representing the public, appointed by the Speaker of the House*

The complete membership list of the Advisory Committee, including contact information, is included as Appendix B.

By law, the Advisory Committee must meet at least four times per year. During 2010, the Advisory Committee met four times: May 25, September 23, October 21 and November 18. Subcommittee meetings were held on June 28, July 12, 21 and 19, August 30, September 23 and 27, October 18 and 27, and November 18. All of the meetings were held in the Judiciary Committee Room or the Legal And Veterans' Affairs Room of the State House in Augusta and were open to the public. Each meeting was also accessible through the audio link on the Legislature's webpage. The Advisory Committee also established a webpage which can be found at www.maine.gov/legis/opla/righttoknow.htm. Agendas and summaries of the meetings are included on the webpage.

A special note of thanks to Christopher Spruce for his dedication to the Right to Know Advisory Committee during his tenure. It was Chris's enthusiasm and perseverance that gave structure to the process to review existing public records exceptions, and his sense of humor that carried us through. The Advisory Committee wishes him well in his next endeavors.

II. RIGHT TO KNOW ADVISORY COMMITTEE DUTIES

The Right to Know Advisory Committee was created to serve as a resource and advisor about Maine's freedom of access laws. The Advisory Committee's specific duties include:

- ❑ Providing guidance in ensuring access to public records and public proceedings;
- ❑ Serving as the central source and coordinator of information about Maine's freedom of access laws and the people's right to know;
- ❑ Supporting the provision of information about public access to records and proceedings via the Internet;

- ❑ Serving as a resource to support training and education about Maine’s freedom of access laws;
- ❑ Reporting annually to the Governor, the Legislative Council, the Joint Standing Committee on Judiciary and the Chief Justice of the Supreme Judicial Court about the state of Maine’s freedom of access laws and the public’s access to public proceedings and records;
- ❑ Participating in the review and evaluation of public records exceptions, both existing and those proposed in new legislation;
- ❑ Examining inconsistencies in statutory language and proposing clarifying standard language; and
- ❑ Reviewing the collection, maintenance and use of records by agencies and officials to ensure that confidential records and information are protected and public records remain accessible to the public.

In carrying out these duties, the Advisory Committee may conduct public hearings, conferences, workshops and other meetings to obtain information about, discuss, publicize the needs of and consider solutions to problems concerning access to public proceedings and records.

The Advisory Committee may make recommendations for changes in statutes to improve the laws and may make recommendations to the Governor, the Legislature, the Chief Justice of the Supreme Judicial Court and local and governmental entities with regard to best practices in providing the public access to records and proceedings and to maintain the integrity of the freedom of access laws.

III. RECENT COURT DECISIONS RELATED TO FREEDOM OF ACCESS ISSUES

By law, the Advisory Committee serves as the central source and coordinator of information about Maine’s freedom of access laws and the people’s right to know. In carrying out this duty, the Advisory Committee believes it is useful to include in its annual reports a digest of the developments in case law relating to Maine’s freedom of access laws. During 2010, the Advisory Committee identified only one decision (Superior Court) and one pending case (Superior Court) on freedom of access issues.

2010 Maine Court Opinions involving Maine’s freedom of access laws

- MacImage of Maine LLC. v. Androscoggin County et al. (Me. Super. Ct., Cumb. Cty., December 22, 2009 and August 3, 2010) (Warren, J.) After the court’s decision in MacImage of Maine, LLC. v. Hancock County et al. (2009), MacImage brought a freedom of access suit against 12 additional counties seeking access to the computer database of records maintained by each county’s registry of deeds. MacImage, believing the requests were not being timely fulfilled made two motions, one for a Temporary Restraining Order (“TRO”) and Preliminary Injunction and a second for an expedited

trial de novo and an order specifying the future course of the proceedings. Motions to dismiss were filed by 10 counties and the two remaining counties filed a motion for summary judgment (but the time for MacImage to oppose the summary judgment motion had not expired at the writing of the court order). The court denied the MacImage motion for TRO; ruled that MacImage's motion for preliminary injunction should be consolidated with the trial on the merits; reserved its decision on MacImage's motion for an expedited scheduling and specification of the future course of the proceedings until all parties had an opportunity to be heard; and denied the counties' pending motions to dismiss.

In the court order dated August 3, 2010, the court denied the motion for summary judgment put forth by Franklin County and Sagadahoc County on the grounds that "in recording and indexing deeds, mortgages, and other land records, the county registries are engaged in the transaction of public or governmental business." On MacImage's motion for a partial summary judgment, the court recognized the defendants who requested a stay or continuance in order to provide further responses limited to the "public records" issue. MacImage's renewed motion for a TRO and Preliminary Injunction was denied.

The trial on the merits began Monday, October 4, 2010. At the time of the trial, six defendants remained: Androscoggin, Aroostook, Cumberland, Knox, Penobscot, and York counties. Issues reserved for trial include, but are not limited to, the following: (a) reasonableness of the fees charged by the registries; (b) cost and feasibility of MacImage's proposed method of access to electronic registry information; (c) whether any portion of MacImage's requests are exempt under Title 1, section 402, subsection 3, paragraph M; and (d) the form and availability of any relief if MacImage prevails.

IV. RIGHT TO KNOW ADVISORY COMMITTEE SUBCOMMITTEES

Given the broad scope of the Advisory Committee's ongoing duties and responsibilities and the nature of the requests received from the Legislature, the Advisory Committee reorganized its Subcommittee structure in 2010. Three Subcommittees were appointed: 1) Legislative; 2) Public Records Exceptions; and 3) Bulk Records. Senator Hobbins and Representative Hill, the legislative members of the Advisory Committee, are ex officio members of each Subcommittee.

Legislative Subcommittee. The Legislative Subcommittee's focus is to serve as an advisor to the Legislature when legislation affecting public access is proposed and to respond to requests from the Legislature or others concerning issues affecting public records and public access. Christopher Spruce¹ served as chair of the Subcommittee and the following serve as members: Shenna Bellows, Karla Black, Robert Devlin, Richard Flewelling, Mal Leary, Judy Meyer, Kelly Morgan, Linda Pistner and Harry Pringle.

¹ Chris Spruce resigned from the Advisory Committee effective November 4, 2010.

During 2010, the Legislative Subcommittee had six meetings. The Subcommittee was charged with several specific tasks.

- Examine use of communication technologies to ensure that decisions are made in proceedings that are open and accessible to the public

LD 1551, An Act To Further Regulate the Communications of Members of Public Bodies, proposed restrictions on the use of e-mail and other communication technologies by members of public boards and commissions. The Right to Know Advisory Committee grappled with the same issue throughout 2009 and came to the conclusion that the law is clear in requiring that decision-making be carried out in public. Guidance to that effect was added as part of the Frequently Asked Questions section of the State's freedom of access webpage. The Judiciary Committee amended LD 1551 to direct the Advisory Committee to take up the issue again, requiring the Advisory Committee to examine and report recommendations concerning how the freedom of access laws can appropriately address the use of communication technologies, both existing and those to be developed in the future, and to ensure that decisions are made in proceedings that are open and accessible to the public. (See Resolve 2009, chapter 171.)

The Legislative Subcommittee reviewed other states' efforts to legislate in response to similar concerns, and discussed constitutional limitations on restrictions of communications, as well as the need for public servants to be well-informed and to be active participants in their communities. The Subcommittee determined that the central concern was to make it clear that any type of communication among members of a public body that occurs outside of a public meeting is prohibited if it circumvents the purposes of the freedom of access laws: Deliberations be conducted openly, and actions be taken openly. The Subcommittee recommended to the full Advisory Committee that the freedom of access policy section be amended to clearly state that outside communications may not be used to defeat the purposes of the chapter.

See discussion of Advisory Committee recommendations in Section VI.

- Consideration of revision of penalties for violations of the freedom of access laws

The Legislature charged the Right to Know Advisory Committee with examining whether penalties for violations of the freedom of access laws should be revised, including consideration of criminalizing violations and making the individual who violates the laws responsible for the penalty, rather than the governmental entity. (See Resolve 2009, c. 171.) There was discussion within the Legislative Subcommittee that some public officials are aware that actions must be taken in public meetings, but continue to try to carry out business in secret meetings or via e-mail or telephone calls. The argument the Subcommittee considered was that a public official who knowingly violates the freedom of access laws in these types of situations should be held personally liable for the penalty, whether it be a civil or criminal fine or other penalty. After much discussion, the Subcommittee decided to continue to support education as the most effective method to ensure compliance with the laws and not amend the penalty provision.

- Whether partisan party caucuses should be specifically excluded from the definition of "public proceedings"

The question of whether partisan caucuses, of the State Legislature as well as of local government, are public has been discussed on many occasions. The Judiciary Committee thought it might be appropriate to state definitively in the law whether partisan caucuses fell within the definition of "public proceedings," and asked the Right to Know Advisory Committee to look at the issue. (See Resolve 2009, c, 171.)

The Legislative Subcommittee reviewed materials prepared by the National Conference of State Legislatures on how caucuses are treated across the country. Although there was interest in stating that caucuses must be open, at least on the legislative level, the Subcommittee members were fully cognizant of the inherent authority of the Legislature to govern its own proceedings, and chose not to recommend including or excluding partisan caucuses from the definition of "public proceedings."

- Protection of private information contained in e-mail and other forms of communication that are sent and received by public officials, particularly communications between elected public officials and their constituents

LD 1802, An Act To Exempt Personal Constituent Information from the freedom of access Laws proposed to exempt from the definition of "public records" any communication between a constituent and an elected official if the constituent expects it to be confidential or if it contains certain personal information. Instead of enacting the proposal, the Legislature directed the Right to Know Advisory Committee to examine issues relating to the protection of private information contained in electronic and other communications that are sent and received by public officials, particularly communications between elected public officials and their constituents. The Advisory Committee was also directed to consider confidentiality requirements related to Legislators' oversight responsibilities, as well as appropriate warnings for public officials to provide with regard to communications that are or may be public records.

The Legislative Subcommittee reviewed statutes from other states that protect the e-mail and other communications of legislators. After much discussion and several drafts, the Subcommittee submitted to the Advisory Committee draft language that protected as confidential information contained in communications by or to public officials if the information were: 1) already designated as exempt from the definition of public records; 2) were designated as confidential by statute; or 3) would be confidential in the hands of another public agency. The Advisory Committee did not reach consensus on the draft and recommitted it to the Legislative Subcommittee. At the same time, the Advisory Committee supported the Legislative Subcommittee's recommendation that a simple but noticeable statement be included on all State webpages indicating that all aspects of communications with the State may be considered public records.

This may change after the Legislative Subcommittee meeting on November 18th and the Advisory Committee meeting on November 18th

See discussion of Advisory Committee recommendations in Section VI.

- Policy on whether e-mail addresses are public records

During the Second Regular Session of the 124th Legislature, the Judiciary Committee was asked pursuant to Title 1, section 434 to review language that proposed to designate as confidential the e-mail addresses of customers and licensees of the Department of Inland Fisheries and Wildlife who engaged in online transactions with the Department. The Legislature did not enact an exemption, but the Judiciary Committee asked the Right to Know Advisory Committee to discuss the issue in depth and report back with any recommendations.

The Legislative Subcommittee discussed whether the e-mail addresses of persons engaging in transactions with the government should remain public records as they exist under current law. The Subcommittee looked at other states' laws that protect such information from public access, collected comments from state and local government officials and debated the issue at length. The Subcommittee recommended no change in the current law, although at least one member was concerned that such a conclusion is not consistent with the public's expectations when they transact business with the State or otherwise communicate with public officials online. The issue was raised as to whether a person's e-mail address is really part of the government's process of conducting business, which is what the freedom of access laws are intended to make transparent and accessible. The Subcommittee's recommendation for a notice about the public nature of communications applies to e-mail addresses as well. The Subcommittee recommended that each State agency post a disclaimer on its website that indicates that a person's e-mail address is a public record.

See discussion of Advisory Committee recommendations in Section VI.

- Examine Central Voter Registry System confidentiality provisions

The Legal and Veterans' Affairs Committee considered *LD 1627, An Act To Improve Access to Data in the Central Voter Registration System*, which rewrote the provisions governing the protection of information in the Central Voter Registration System. The Judiciary Committee and the Advisory Committee have been involved in reviewing the statutory confidentiality provisions for several years because the entire database is designated confidential, with limited, carefully crafted exceptions to that confidentiality. Upon enactment of LD 1627 as Public Law 2009, chapter 564, the Judiciary Committee asked the Advisory Committee to review the CVR System revision to ensure that it embodies an appropriate departure from the usual declaration that all governmental records are public, with few if any specified exceptions.

The Legislative Subcommittee reviewed the information provided by the Legal and Veterans' Affairs Committee staff as well as the Secretary of State's Office, and found that the law is meticulous in identifying which information is available to specified requestors. The Subcommittee concluded that the law strikes an appropriate balance between providing

information to ensure the integrity of the voting process and the need to protect privacy and not create a disincentive to register and vote. The Subcommittee recommended no change to the current law.

- Examine protection of Social Security Numbers

The Advisory Committee has been studying the treatment of Social Security Numbers in public records from almost the inception of the Advisory Committee. In 2009, the Advisory Committee developed legislation that would phase in prohibition of collection of SSNs except when required by law, along with specified processes for ensuring that those SSNs appropriately collected are protected from public access. The Advisory Committee chose not to recommend the draft, based mostly on the comments received from various State agencies that believed the proposal was unworkable with present systems.

The Legislative Subcommittee, after much discussion, recommended that the law be amended to simply state that Social Security Numbers are not public records. This allows records custodians to redact SSNs when they appear in otherwise public records. The Subcommittee recognized that the draft may not affect the responsibilities of Registers of Deeds with regard to protecting SSNs that are part of records filed with the Registries.

The Bulk Records Subcommittee also considered the proposed recommendation concerning Social Security Numbers and was not comfortable recommending the change without further input from agencies. (See Bulk Records Subcommittee discussion on page ??.)

See discussion of Advisory Committee recommendations in Section VI.

- Examine the use of technology in attending meetings

The Advisory Committee developed draft legislation in 2009 to specifically address public bodies holding meetings using conference call or other communications technology. There is concern that current law does not allow members who not physically present to be counted as part of the quorum or to vote. Four entities have special language in their statutes enabling meetings among members that are located in different places at the time of the meeting:

- Finance Authority of Maine, 10 MRSA §971;
- Commission on Governmental Ethics and Election Practices, 21-A MRSA §1002;
- Emergency Medical Services Board, 32 MRSA §88, sub-§1, ¶D; and
- Workers' Compensation Board, 39-A MRSA §151, sub-§5.

The Legislative Subcommittee revised the draft developed in 2009 and proposed amendments to the statutes of the four entities to make the proposed language apply to them in most situations. Comments from two of the four entities were received, raising concerns about the draft language.

This may change after the Legislative Subcommittee meeting on November 18th and the Advisory Committee meeting on November 18th

See discussion of Advisory Committee recommendations in Section VI.

- ♦ Revisit the recommendation to require the records of public proceedings

In 2009, the Right to Know Advisory Committee recommended, although not unanimously, that records be kept of all public proceedings. *LD 1791, An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Records of Public Proceedings* was heard and discussed by the Judiciary Committee. Citing a few significant concerns, the Judiciary Committee instead reported out a resolve directing the Advisory Committee to revisit the issue. (See Resolve 2009, chapter 186.)

The Legislature Subcommittee reviewed the prior materials on requirements for records of public proceedings and developed a draft that addressed the Judiciary Committee's concerns about the contents of the record and the consequences for failure to make and maintain a record. On the advice of the Legislative Policy Committee of the Maine Municipal Association, the full Advisory Committee considered draft language that included imposing the requirement on only those public bodies that have actual authority, as opposed to advisory committees and such.

See discussion of Advisory Committee recommendations in Section VI.

- ♦ Examine the scope of process to review proposed public records exceptions

During the Second Regular Session of the 124th Legislature, the Judiciary Committee reviewed, ostensibly under Title 1, section 434, a proposed change in the fee structure for copies of specific public records. The Judiciary Committee reluctantly came to the conclusion that the statute requiring the review did not include criteria for proposals that may deleteriously affect public access to public records. The Judiciary Committee requested the Advisory Committee to consider the review criteria and make any recommendations appropriate to ensure public access to public records.

The Legislative Subcommittee discussed the concerns and noted that both the Advisory Committee, in its review of existing public records exceptions, and the Judiciary Committee, in its review of proposed public records exceptions, follow the specific questions listed in the statutes in reviewing and evaluating exceptions. See 1 MRSA §432 and §434. The Subcommittee developed language to include the consideration of any factors that affect the accessibility of public records, including but not limited to fees, request procedures and timeliness of responses.

See discussion of Advisory Committee recommendations in Section VI.

- ♦ Explore expansion of mandatory FOA training for appoint municipal and county clerks

The Legislative Subcommittee discussed the need for expanding the training required under Title 1, section 412. In some communities, clerks are appointed positions rather than elected, although the duties are identical. The Subcommittee explored expanding mandatory training to cover appointed clerks. **Legislation Subcommittee results?**

See discussion of Advisory Committee recommendations in Section VI.

Public Records Exceptions Subcommittee. The Public Records Exception Subcommittee's focus is to participate in the review and evaluation of public records exceptions, both existing and those proposed in new legislation; to examine inconsistencies in statutory language and to propose clarifying standard language. Shenna Bellows is the chair of the Subcommittee and the following serve as members: Karla Black, Ted Glessner, Suzanne Goucher, AJ Higgins, Linda Pistner and Christopher Spruce.

During 2010, the Public Records Exception Subcommittee held three meetings. The Subcommittee began its review and evaluation of all the 123 public records exceptions in Titles 22 through 25 that were initially identified as requiring review. By request, the Subcommittee also reconsidered the development of appropriate standard statutory language for protected information provided in applications for government funding or technical assistance and appropriate standard language for records and information of advisory panels.

The Subcommittee's process of review and evaluation began by sending a questionnaire to each agency that acts as a custodian of the records listed in Titles 22 through 25. Records custodians were generous with their time in responding to the questions (the Bureau of Insurance provided 56 responses, and the Department of Health and Human Services was able to provide responses to 28 questionnaires). The information collected provided guidance to the Subcommittee concerning the types of records and information subject to the public record exception at issue, whether the public record exception has been cited as a means for denying a request, whether the public records exception should be continued or modified, and any other persons with whom the Subcommittee should consult in its review and evaluation. Thomas Record, Senior Staff Attorney, Bureau of Insurance, not only prepared the responses for the Bureau and met with staff, but also spent an afternoon with the Subcommittee explaining current law and how the statutes operate. Charles Soltan, an attorney representing insurance interests affected by the statutes, participated in two Subcommittee meetings as well. The Subcommittee appreciates the assistance of all the participants and the records custodians and interested persons who provided information.

The Subcommittee made recommendations on the majority of the provisions slated for review this biennium, and tabled the rest, as well as the Criminal History Record Information Act and a revision of the standard drafting templates, until the Subcommittee can reconvene in 2011.

In its discussion of the Title 24-A exceptions, the Subcommittee talked about the issue of records that are both confidential and not subject to subpoena. It was not clear whether changing the subpoena language would impact state law accreditation. States must adopt the same or

substantially similar language to that in model laws to retain accreditation status. Ms. Bellows noted that she was concerned about under-regulation of some of the insurance businesses and that she was uncomfortable with exceptions that are so broad and except records from subpoenas in court proceedings. Ms. Black indicated that she was uncomfortable amending the language, since it is not known how that would impact accreditation, the Bureau of Insurance and consumers. Although the other members present felt comfortable with the reasons for the exception from subpoena, Ms. Bellows expressed that in principle she would vote against the motion to leave those exceptions with no change and did. The Subcommittee recommended that the Judiciary Committee look at the general question of information not being subject to subpoena.

Ms. Bellows also recommended that all rate filings be public from the date they are filed and dissented from majority decisions to retain confidentiality until approved.

The Subcommittee discussed the issue of examinations of viatical or life settlement companies and why these reports are not made public when filed. Because the issue of life settlements has been discussed 5 years in a row, the Subcommittee voted to not recommend changes at this time, but to flag it for future review by the Insurance and Financial Services Committee. Ms. Bellows, again in principle, voted against the Subcommittee's recommendation for no change.

See discussion of Advisory Committee recommendations in Section VI.

Bulk Records Subcommittee. The Bulk Records Subcommittee's focus is to respond to the questions raised by the Legislature in Public Law 2009, chapter 567, section 11. Bob Devlin is the chair of the Subcommittee and the following serve as members: Karla Black, Richard Flewelling and Judy Meyer.

During 2010, the Bulk Records Subcommittee held three meetings. The Subcommittee considered the following issues:

- Public access to databases;
- Protection of personal information that is not designated as confidential but is contained in databases that include public records;
- Reasonable costs for copies when public records are requested in bulk;
- Whether access or costs should be based on the intended or subsequent use of the information requested in bulk;
- The acceptable formats for responses to requests, including electronic and paper; and
- The appropriate role for InforME in responding to requests for public records in bulk.

The complexity of these issues related to bulk records, coupled with the pending litigation, MacImage of Maine LLC. v. Androscoggin County et al. (Me. Super. Ct., Cumb. Cty., December 22, 2009 and August 3, 2010), resulted in the Subcommittee identifying a number of questions and conclusions but no specific recommendations for policy or legislative changes at this time. Also of note regarding bulk records issues is that because of the pending litigation,

another working group, the Bulk Data Stakeholders Group, which is staffed by OIT and was created at the request of the State and Local Government Committee, tabled its work after convening for only one meeting in July. The State and Local Government Committee requested that Office of Information Technology (OIT) in the Department of Administrative and Financial Services convene the stakeholder group and include: a representative from the Maine County Commissioners Association, the Register of Deeds Association, the Maine Association of Realtors; a person representing the interests of title attorneys; a member from the Right to Know Advisory Committee; a representative from MacImage, and any other parties that are relevant and interested. The group was tasked with defining bulk data transfers, evaluating the best way to handle such requests and developing a web portal for the 18 county registry offices. The State and Local Government Committee asked that the Stakeholders Group report back by January 15, 2011; however, the counties have been advised by their counsel not to participate in the group with John Simpson, who is the principal of MacImage. With the case not settled, the State and Local Government Committee does not anticipate a report from the Stakeholders Group during the First Regular Session of the 125th Legislature. These issues are all interrelated and most could not be discussed without discussing others simultaneously.

- Public access to databases
- The acceptable formats for responses to requests, including electronic and paper

The Subcommittee reviewed and discussed definitions of “bulk data” and “bulk records” and whether the public has a right to access record(s) within a database or the entire database. The Subcommittee found that although there are some examples of these definitions in other states’ statutes and judicial rules, the provisions are scattered in individual departments and agencies and are not universally applied across any state system. Because departments and agencies differ in how they maintain and how they disseminate public records, this idea of defining a “one size fits all” approach, again coupled with the issue being part of pending litigation, led to no specific recommendation regarding adopting definitions for “bulk records” and “bulk data” and therefore, no specific parameters for defining and responding to requests for records of a bulk nature. The Subcommittee discussed the format of public records, access to those records and what the obligations of agencies are to provide access to those records. Although agencies do not have to create documents that do not exist, they do have to provide what the requester seeks and provide it in a manner that is useable. Formats for data may be fairly standard; records are provided on disk, thumb drives, by e-mail and in paper form; however the Subcommittee learned that some county registries do not have the capacity to respond to a requester in a certain format.

Looking at public access also raised questions of security and proprietary matters, especially when data is to be provided in its original form. Also, a requester may be unable to do anything with the records - so what is an agency’s obligation to decipher codes and fields and provide documentation? Who should bear the costs of translating information if it is otherwise unusable when received? These questions were raised by state and county officials. Counties contract with vendors to maintain their records from the registry of deeds, and vendors will not simply transfer documents to requesters from the vendors’ programs. A separate account would have to be established, so that the transfer would not endanger the safety or integrity of the original records. Some have questioned this process as well, because the documents that are released are

not original or “official” registry documents, which may not satisfy the purposes for which they were requested. Furthermore, the meaning of data may be lost in the transfer, and the only one that can make sense of it is the custodial agency. Although an agency has no obligation to create new documents, there is an expectation that a requester receive the data in the format requested if reasonable.

The Office of Information Technology and others are constantly looking at bulk data management and formatting changes to meet the needs of agencies. They are also constantly working on retention policies and ways to access and manipulate documents whose formats change over time. One of OIT’s jobs is to ensure that their operational system is responsive to requests. There already exists an enterprise data catalog created by InforME that is free and searchable by category and key word. This service might be a solution for simple requests for straightforward data sets.

There was Subcommittee consensus that public records, bulk or otherwise, are public and should be provided to the requester in a useable form and public records are not free – there are costs involved, which should also be reasonable.

- Protection of personal information that is not designated as confidential but is contained in databases that include public records

In the context of discussions about bulk records, the Subcommittee discussed Social Security Numbers (SSNs) that may be buried in public documents everywhere. The Subcommittee reviewed the recommended language of the Legislative Subcommittee that establishes that SSNs are not a public record without providing any confidentiality protection. Although the legislative proposal appears not to impose a duty to redact on the part of departments and agencies, some members expressed an interest in hearing the potential concerns of those departments, agencies and municipalities that would be affected. Although the Legislative Subcommittee supported this change, the Bulk Records Subcommittee felt that it was premature to send a legislative recommendation to the Advisory Committee with unresolved questions. The Subcommittee discussed having a public hearing to discuss the SSN issue and hear from interested parties (public and government), but was unable to do so this interim.

- Reasonable costs for copies when public records are requested in bulk
- Whether access or costs should be based on the intended or subsequent use of the information requested in bulk

One of the first issues that the Subcommittee discussed was that of “reasonable fees” for public records, including bulk records. The Subcommittee reviewed draft language that outlined the same process for determining reasonable fees for copies as was enacted into the Register of Deeds statutes in Title 33, §751, subsection 14 pursuant to Public Law 2009, c. 575. The draft incorporated language like that in Title 33 into Title 1, §408, subsection 3 dealing with payment of costs for records under the freedom of access laws. The Subcommittee solicited and received useful feedback from interested parties regarding the draft. Although some members wanted to

proceed with amending Title 1, the Subcommittee ultimately decided that because the litigation involving MacImage and the counties includes the court looking specifically at the issue of what are “reasonable fees,” it made sense to postpone making a recommendation. Members of the Subcommittee, as well as some interested parties, expressed concern that the current law is confusing, and amending it now with litigation pending might only add to the confusion. It makes sense to wait before recommending another statutory change, since the court’s decision might undo the law and require that the Advisory Committee revisit the issue all over again.

The Subcommittee agreed to provisionally approve the proposed language as drafted but to wait to move forward pending the outcome of the court case, and suggested that the Advisory Committee’s recommendations include informing the Legislature of this and suggesting that the Judiciary Committee revisit the issue of reasonable fees if the litigation is resolved during the First Regular Session of the 125th Legislature.

The Subcommittee looked at other states’ practices regarding restrictions on use of bulk records and heard from county and state officials on this point. Some felt that a public record, including bulk records, are public and once disseminated, the requester should be able to use the record(s) for any purpose. Others felt that it may be appropriate to draw distinctions. A number of states do impose restrictions on use and require that the requester sign a contract or otherwise agree to certain terms of use or face penalties. Others take the approach of not restricting use of a public record. Currently, some bulk records are collected and distributed for purposes like public safety (i.e., the sale of Secretary of State motor vehicle records to insurers), and others are collected for different purposes. The consensus of the Subcommittee appeared to be that bulk records are to be treated like any other public records, without restrictions on use, but again with the caveat that they are not free, and that it is reasonable for custodial agencies to charge for the costs of providing records.

- The appropriate role for InforME in responding to requests for public records in bulk

Kelly Hokkanen who administers InforME educated the Subcommittee about InforME’s Bulk Data Services. (*she distributed a handout – want to include in appendices?*) She explained that there are different kinds of requests ranging from individual records to batches of records, whole databases, and regular records updates to subscribers. Ms. Hokkanen also discussed the issue of persons who request a record under the freedom of access laws when the record is currently available for a fee under InforME. This led to further talks about what is subject to freedom of access and what is a bulk sale, and whether there should be any distinction or restrictions. The Subcommittee was not in agreement on the issues and recommends carrying this forward.

Beverly Bustin Hatheway, Register of Deeds for Kennebec County, noted that she has been looking at other states’ work in the area of creating and implementing bulk data policies and concluded that it takes years to create and implement such policies.

Ms. Black also recognized and thanked Ms. Hokkanen for all of her help creating the existing Maine Freedom of Access website at <http://www.maine.gov/foaa/>

See discussion of Advisory Committee recommendations in Section VI.

V. ACTIONS RELATED TO RIGHT TO KNOW ADVISORY COMMITTEE RECOMMENDATIONS CONTAINED IN FOURTH ANNUAL REPORT

The Right to Know Advisory Committee made several recommendations in its third annual report. The actions taken in 2009 as a result of those recommendations are summarized below.

<p>Recommendation: Continue, amend and repeal the specified existing public records exceptions in Titles 10 to 21-A</p>	<p>Action: The Judiciary Committee accepted all the recommendations of the Advisory Committee with regard to specific public records exceptions as proposed in LD 1792, enacted as Public Law 2009, chapter 567, except those relating to the Finance Authority of Maine.</p>
<p>Recommendation: Recommend again that the teacher confidentiality provisions in Title 20-A be amended with regard to the public disclosure of actions taken by the Department of Education on credentials of public school personnel, including the grounds for actions taken</p>	<p>Action: The Judiciary Committee accepted all the recommendation concerning release of information about disciplinary act by the Commissioner of Education. It is included as Section 10 of Public Law 2009, chapter 567.</p>
<p>Recommendation: Amend Title 1, chapter 13 to require that a minimum record be kept of all public proceedings</p>	<p>Action: The Advisory Committee's recommendations were introduced as LD 1791. Concerns were raised about the proposal, and the issue was sent back to the Advisory Committee as Resolve 2009, chapter 186.</p>
<p>Recommendation: Add guidance for public officials on the use of e-mail communications outside of public</p>	<p>Action: The Frequently Asked Questions on the State's freedom of access webpage www.maine.gov/foaa were revised to provide more guidance about avoiding inappropriate action outside of public meetings. But see LD 1551, An Act To Further</p>

<p>proceedings to the Frequently Asked Questions section of the freedom of access website</p>	<p>Regulate the Communications of Members of Public Bodies, which was finally passed as Resolve 2009, chapter 171, directing the Advisory Committee to take up the issue in 2010.</p>
<p>Recommendation: to the Health and Human Services Committee that the freedom of access laws not be amended to require hospital board meetings to be open to the public as proposed in LD 757, An Act to Improve the Transparency of Certain Hospital</p>	<p>Action: The Health and Human services Committee reported out LD 757 as Ought Not To Pass on January 20, 2010.</p>
<p>Recommendation: to the Judiciary Committee that no statutory changes be made relating to the public's access to salary information for public employees as proposed in LD 1353, An Act Concerning Salary Information of Public Employees</p>	<p>Action: The Judiciary Committee did not consider any statutory changes on this issue (LD 1353 was voted Ought Not To Pass in 2009, but the issue was sent to the Right to Know Advisory Committee to review and make recommendations).</p>
<p>Recommendation: Propose standard statutory language for use by the Judiciary Committee in reviewing proposed exceptions relating to the protection of information submitted by individuals and businesses applying for technical or financial assistance from government entities</p>	<p>Action: The Judiciary Committee accepted the drafting templates, but chose not to support the templates as applied to the confidentiality provisions of the Finance Authority of Maine. LD 1792 was enacted as Public Law 2009, chapter 567 without the Title 10 amendments and cross-references.</p>
<p>Recommendation: That the Advisory Committee continue discussion of the</p>	<p>Action: The Advisory Committee assigned these issues to Subcommittees in 2010 and recommendations are included in this report.</p>

following issues: the use of Social Security Numbers, the use of technology in public proceedings and requests for bulk electronic data	
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VI. RECOMMENDATIONS

During 2010, the Advisory Committee engaged in the following activities and makes the recommendations summarized below.

Continue, amend and repeal the following existing public records exceptions in Titles 22 through 25

As required by law, the Advisory Committee reviewed the existing public records exceptions identified in Title 22 through Title 25. The Advisory Committee's recommendations are summarized below.

The Advisory Committee recommends that the following exceptions in Titles 22 through 25 be continued without change.

- ◆ Title 22, section 17, subsection 7, relating to records of child support obligors
- ◆ Title 22, section 42, subsection 5, relating to DHHS records containing personally identifying medical information
- ◆ Title 22, section 261, subsection 7, relating to records created or maintained by the Maternal and Infant Death Review Panel
- ◆ Title 22, section 664, subsection 1, relating to State Nuclear Safety Program facility licensee books and records
- ◆ Title 22, section 666, subsection 3, relating to the State Nuclear Safety Program concerning the identity of a person providing information about unsafe activities, conduct or operation or license violation
- ◆ Title 22, section 811, subsection 6, relating to hearings regarding testing or admission concerning communicable diseases
- ◆ Title 22, section 815, subsection 1, relating to communicable disease information
- ◆ Title 22, section 824, relating to persons having or suspected of having communicable diseases
- ◆ Title 22, section 832, subsection 3, relating to hearings for consent to test for the source of exposure for a blood-borne pathogen
- ◆ Title 22, section 1064, relating to immunization information system
- ◆ Title 22, section 1233, relating to syphilis reports based on blood tests of pregnant women
- ◆ Title 22, section 1317-C, subsection 3, relating to information regarding the screening of children for lead poisoning or the source of lead exposure

- ◆ Title 22, section 1494, relating to occupational disease reporting
- ◆ Title 22, section 1596, relating to abortion and miscarriage reporting
- ◆ Title 22, section 1597-A, subsection 6, relating to a petition for a court order consenting to an abortion for a minor
- ◆ Title 22, section 2153-A, subsection 1, relating to information provided to the Department of Agriculture by the US Department of Agriculture, Food Safety and Inspection Service
- ◆ Title 22, section 2153-A, subsection 2, relating to information provided to the Department of Agriculture by the US Food and Drug Administration
- ◆ Title 22, section 2425, subsection 8, paragraph A, relating to information submitted by qualifying and registered patients under the Maine Medical Use of Marijuana Act
- ◆ Title 22, section 2425, subsection 8, paragraph B, relating to information submitted by primary caregivers and physicians under the Maine Medical Use of Marijuana Act
- ◆ Title 22, section 2425, subsection 8, paragraph C, relating to list of holders of registry identification cards under the Maine Medical Use of Marijuana Act
- ◆ Title 22, section 2425, subsection 8, paragraph F, relating to information contained in dispensary information that identifies a registered patient, the patient's physician and the patient's registered primary caregiver under the Maine Medical Use of Marijuana Act
- ◆ Title 22, section 2425, subsection 8, paragraph G, relating to information that identifies applicants for registry identification card, registered patients, registered primary caregivers and registered patients' physicians under the Maine Medical Use of Marijuana Act
- ◆ Title 22, section 2425, subsection 8, paragraph J, relating hearing on revocation of a registry identification card under the Maine Medical Use of Marijuana Act unless card is revoked
- ◆ Title 22, section 2698-A, subsection 7, relating to prescription drug marketing costs submitted to the Department of Health and Human Services
- ◆ Title 22, section 2698-B, subsection 5, relating to prescription drug information provided by the manufacturer to the Department of Health and Human Services concerning price
- ◆ Title 22, section 3474, subsection 1, relating to adult protective records
- ◆ Title 22, section 3762, subsection 3, relating to TANF recipients
- ◆ Title 22, section 4007, subsection 1-A, relating to a protected person's current or intended address or location in the context of child protection proceeding
- ◆ Title 22, section 4008, subsection 3-A, relating to the child death and serious injury review panel
- ◆ Title 22, section 4018, subsection 4, relating to information about a person delivering a child to a safe haven
- ◆ Title 22, section 4021, subsection 3, relating to information about interviewing a child without prior notification in a child protection case
- ◆ Title 22, section 4087-A, subsection 6, relating to information held by or records or case-specific reports maintained by the Child Welfare Ombudsman
- ◆ Title 22, section 4306, relating to general assistance
- ◆ Title 22, section 5328, subsection 1, relating to community action agencies' records about applicants and providers of services

- ◆ Title 22, section 7250, subsection 1, relating to the Controlled Substances Prescription Monitoring Program
- ◆ Title 22, section 7703, subsection 2, relating to facilities for children and adults
- ◆ Title 24, section 2302-A, subsection 3, relating to utilization review data provided by a nonprofit hospital or medical service organization
- ◆ Title 24, section 2307, subsection 3, relating to an accountant's work papers concerning a nonprofit hospital or medical service organizations
- ◆ Title 24, section 2986, subsection 2, relating to billing for forensic examinations for alleged victims of gross sexual assault
- ◆ Title 24, section 2986, subsection 3, relating to District Court hearings on storing or processing forensic examination kit of gross sexual assault
- ◆ Title 24-A, section 414, subsections 4 and 5, relating to insurance certificate of authority audit work papers
- ◆ Title 24-A, section 796-A, relating to proprietary business information of special purpose insurance vehicle filed with the Superintendent of Insurance
- ◆ Title 24-A, section 994, subsection 2, paragraph A, and subsection 4 relating to property and casualty actuarial report, work papers or actuarial opinion summary in possession or control of Bureau of Insurance
- ◆ Title 24-A, section 1905, subsection 1, relating to credit and investigative reports concerning insurance administrator applicants
- ◆ Title 24-A, section 1911, relating to insurance audits and examinations
- ◆ Title 24-A, section 2187, subsection 6, relating to insurance fraud reporting
- ◆ Title 24-A, section 2204, subsection 4, relating to insurance investigative information (definition)
- ◆ Title 24-A, section 2384-B, subsection 8, relating to workers' compensation insurance rating concerning claims and self-insurance
- ◆ Title 24-A, section 2384-C, subsection 7, relating to workers' compensation insurance concerning claims and self-insurance
- ◆ Title 24-A, section 2483, subsection 6, relating to the Interstate Insurance Product Regulation Commission work papers and individuals privacy and proprietary information of insurers
- ◆ Title 24-A, section 2736, subsection 2, relating to rate filings on individual health insurance policies
- ◆ Title 24-A, section 2749, subsection 3, relating to utilization review data for health insurance contracts
- ◆ Title 24-A, section 2808-B, subsection 2-A, relating to rate filings for small group health plans
- ◆ Title 24-a, section 2847, subsection 3, relating to utilization review data for group and blanket health insurance
- ◆ Title 24-A, section 4224, subsections 1 and 2, relating to quality assurance committees of health maintenance organizations
- ◆ Title 24-A, section 4228, subsection 3, relating to utilization review data for health maintenance organizations
- ◆ Title 24-A, section 4233, subsection 2, relating to health maintenance organizations work papers filed with the Superintendent of Insurance

- ◆ Title 24-A, section 4406, subsection 3, relating to delinquent insurers
- ◆ Title 24-A, section 4612-A, subsection 1, relating to information reported by the Superintendent of Insurance to the National Association of Insurance Commissioners Insurance Regulatory Information System Board
- ◆ Title 24-A, section 6715, relating to captive insurance companies information submitted to the Superintendent of Insurance
- ◆ Title 24-A, section 6907, subsection 2, relating to health information obtained by Dirigo Health covered by the federal Health Insurance Portability and Accountability Act of 1996, or c. 24, or T.22 section 1711-C
- ◆ Title 24-A, section 6907, subsection 3, relating to practitioner-specific quality data collected, used, produced or maintained for measuring the professional performance of a health care practitioner by the Maine Quality Forum
- ◆ Title 24-A, section 6907, subsection 1, relating to personally identifiable financial information obtained by Dirigo Health
- ◆ Title 25, section 1577, subsection 1, relating to the state DNA data base and the state DNA data bank
- ◆ Title 25, section 2006, relating to concealed firearms permit applications
- ◆ Title 25, section 2413, subsection 1, relating to information received under the Arson Reporting Immunity Act
- ◆ Title 25, section 2806, subsection 8, relating to proceedings of the board of trustees of the Maine Criminal Justice Academy concerning complaints of misconduct of law enforcement officers
- ◆ Title 25, section 2957, relating to Maine Drug Enforcement Agency investigative records

The Advisory Committee recommends, with one dissenting vote, that the following exceptions in Titles 22 through 25 be continued without change.

- ◆ Title 24-A, section 222, subsection 13, relating to insurance information filed with the Superintendent of Insurance concerning registration statements, tender offers, requests or invitations for tender offers, options to purchase, agreements
- ◆ Title 24-A, section 423-C, subsection 4, relating to insurance reports of material transactions
- ◆ Title 24-A, section 1420-N, subsection 6, relating to insurers and producers
- ◆ Title 24-A, section 2169-B, subsection 6, insurance scoring model
- ◆ Title 24-A, section 2304-A, subsection 7, relating to insurance rate filings
- ◆ Title 24-A, section 2304-C, subsection 3, relating to physicians and surgeons liability insurance rate filings
- ◆ Title 24-A, section 2412, subsection 8, relating to insurance contracts and forms
- ◆ Title 24-A, section 4245, subsections 1 and 3, relating to health maintenance organizations accreditation survey report
- ◆ Title 24-A, section 6458, subsection 1, relating to risk-based capital standards for insurers
- ◆ Title 24-A, section 6708, subsection 2, relating to examination of captive insurance companies documents

- ◆ Title 24-A, section 6807, subsection 7, paragraph A, relating to individual identification data of viators (suggested review by IFS Committee)
- ◆ Title 24-A, section 6818, subsections 6 and 8, relating to fraudulent viatical or life insurance settlements information provided for enforcement
- ◆ Title 25, section 2929, subsections 1, 2, 3 and 4, relating to emergency services communications

The Advisory Committee recommends a substantive statutory change to the following public records exception. See draft legislation in Appendix C.

- ◆ Title 24-A, section 2325-B, subsection 9, relating to mandatory property and casualty insurance market assistance program policy form and rate filings

The Advisory Committee recommends a statutory change, not intended to effect a substantive change, to the following public records exceptions in order to make confidentiality language as consistent as possible throughout the statutes. See draft legislation in Appendix C.

- ◆ Title 24, section 2329, subsection 8, relating to alcoholism and drug treatment patient records of nonprofit hospitals and medical service organizations
- ◆ Title 24-A, section 225, subsection 3, relating to insurance examination reports
- ◆ Title 24-A, section 226, subsection 2, relating to insurance examination reports furnished to the Governor, the Attorney General and the Treasurer of State pending final decision
- ◆ Title 24-A, section 227, relating to information pertaining to individuals in insurance examination reports
- ◆ Title 24-A, section 2323, subsection 4, relating to reports of insurers concerning loss and expense experience
- ◆ Title 24-A, section 2842, subsection 8, relating to alcoholism and drug treatment patient records for group and blanket health insurance

The Advisory Committee recommends, with one dissenting vote, a statutory change, not intended to effect a substantive change, to the following public records exceptions in order to make confidentiality language as consistent as possible throughout the statutes. See draft legislation in Appendix C.

- ◆ Title 24-A, section 952-A, subsection 4, relating to actuarial opinion of reserves

The Right to Know Advisory Committee recommends that the following statutory sections be repealed as the entire sections are no longer necessary. See draft legislation in Appendix C.

- ◆ Title 22, section 1065, subsection 3, relating to manufacturer and distributor reports on distribution of influenza immunizing agents
- ◆ Title 24-A, section 2315, relating to information submitted to fire insurance advisory organizations

The Advisory Committee tabled consideration of the following exceptions.

- ◆ Criminal History Record Information Act, Title 16, chapter 3, subchapter 8
- ◆ Title 22, section 1555-D, subsection 1, relating to lists maintained by the Attorney General of known unlicensed tobacco retailers
- ◆ Title 22, section 1696-D, relating to the identity of chemical substances in use or present at a specific location if the substance is a trade secret
- ◆ Title 22, section 1696-F, relating to the identity of a specific toxic or hazardous substance if the substance is a trade secret
- ◆ Title 22, section 1711-C, subsection 2, relating to hospital records concerning health care information pertaining to an individual
- ◆ Title 22, section 1828, relating to Medicaid and licensing of hospitals, nursing homes and other medical facilities and entities
- ◆ Title 22, 1848, subsection 1, relating to documents and testimony given to Attorney General under Hospital and Health Care Provider Cooperation Act
- ◆ Title 22, section 2706, relating to prohibition on release of vital records in violation of section; recipient must have “direct and legitimate interest” or meet other criteria
- ◆ Title 22, section 2706-A, subsection 6, relating to adoption contact files
- ◆ Title 22, section 2769, subsection 4, relating to adoption contact preference form and medical history form
- ◆ Title 22, section 3022, subsections 8, 12 and 13, relating to medical examiner information
- ◆ Title 22, section 3034, subsection 2, relating to the Chief Medical Examiner missing persons files
- ◆ Title 22, section 3188, subsection 4, relating to the Maine Managed Care Insurance Plan Demonstration for uninsured individuals
- ◆ Title 22, section 3192, subsection 13, relating to Community Health Access Program medical data
- ◆ Title 22, section 4008, subsection 1, relating to child protective records
- ◆ Title 22, section 7703, subsection 2, relating to facilities for children and adults
- ◆ Title 22, section 8754, relating to medical sentinel events and reporting
- ◆ Title 22, section 8824, subsection 2, relating to the newborn hearing program
- ◆ Title 22, section 8943, relating to the registry for birth defects
- ◆ Title 23, section 63, relating to records of the right-of-way divisions of the Department of Transportation and the Maine Turnpike Authority
- ◆ Title 23, section 1980, subsection 2-B, relating to recorded images used to enforce tolls on the Maine Turnpike
- ◆ Title 23, section 1982, relating to patrons of the Maine Turnpike

- ◆ Title 23, section 4251, subsection 10, relating to records in connection with public-private transportation project proposals of at least \$25,000,000 or imposing new tolls
- ◆ Title 23, section 8115, relating to the Northern New England Passenger Rail Authority

The Advisory Committee also recommends that the Judiciary Committee consider a comprehensive review of the statutes that protect information not only from public access but also from access through subpoena. The Advisory Committee raises the question of whether there should be a consistent policy with regard to when information is neither public accessible nor available in court proceedings.

The Advisory Committee recommends that the Insurance and Financial Services Committee keep in mind that the examination reports of viatical or life settlement companies are not public records, and are therefore treated differently than all other insurance examination reports prepared by the Bureau of Insurance. Because the laws are recently amended, a review of the issue in a year or two may be appropriate.

- Amend the freedom of access statute to clearly state that all forms of communications, including electronic mail, not be used to defeat the purposes of the freedom of access laws**

The Advisory Committee finds that it is important to make clear that any type of communication among members of a public body that occurs outside of a public meeting is prohibited if it circumvents the purposes of the freedom of access laws: Deliberations must be conducted openly, and actions must be taken openly. The Advisory Committee recommends that the policy section be amended to clearly state that outside communications may not be used to defeat the purposes of the chapter. See draft legislation in Appendix D.

- Retain the existing penalty provisions of the freedom of access laws** (do we want to include “no action” recommendations?)

The Advisory Committee does not recommend any statutory change to the existing penalties provisions at this time, preferring to continue to rely on better education about the rights and responsibilities under the freedom of access laws.

- Do not address the application of the freedom of access laws to partisan caucuses**

The Advisory Committee does not recommend any statutory change addressing whether partisan caucuses should be considered “public proceedings.”

- Include a simple but noticeable statement on all State webpages that all aspects of communications with the State, including an individual's e-mail address, may be considered public records**

The Advisory Committee recommends that all State webpages include a notice that is easily seen and understood that all aspects of communications with the State, including e-mail addresses, may be considered public information. Local governments should consider the same precautions to make their constituents aware of the possibility that information provided via the Internet may be accessible as public records. Both the Office of Information Technology and InforME may have important roles implementation.

- Retain the Central Voter Registry System's confidentiality provisions as enacted by Public Law 2009, chapter 564**

The Advisory Committee is satisfied with the balance of confidentiality and public access to information contained in the Central Voter Registry System and does not recommend statutory changes.

- Amend the freedom of access laws to clarify the Social Security Numbers are not public records (Bulk Records Subcommittee concerns?)**

The Advisory Committee recommends that the freedom of access laws be amended to clarify that Social Security Numbers are not public records. See draft legislation in Appendix D.

- Enact legislation governing the participation in meetings by members of public bodies using technology (not unanimous; what to do about FAME, Emergency Medical Services Board, Ethics Commission, Workers' Comp Board comments?)**

A majority of the Advisory Committee recommends that new language be adopted to specifically allow the participation in meetings of public bodies by members of those public bodies who are not physically present. The silence in the general law with regard to establishing a quorum or voting using a conference call or other technology has led to the interpretation that only members physically present can be counted towards a quorum, and only those present can vote. The proposed language allows participation by members from remote locations only if a quorum is physically present, and provides other limitations and protections. See draft legislation in Appendix D.

- Enact legislation to require records of public proceedings**

A majority of the Advisory Committee recommends enactment of a statutory requirement that a record be kept of all public proceedings for which notice is required to be given. The record can

be in writing or any other medium, and is subject to the existing record retention requirements for that type of records. The information to be recorded is limited to: the date, time and place of the public proceeding; the members of the body holding the public proceeding, recorded as either present or absent; and all motions and votes taken, by individual members if there is a roll call vote. Failure to make or retain the record as required does not effect the validity of any actions taken. The requirements do not apply to public bodies whose purpose is advisory only, and have no decision-making authority. See draft legislation in Appendix D.

Enact legislation to expand the scope of the process of reviewing proposed public records exceptions to include access issues

The Advisory Committee recommends that the review and evaluation process for proposed public records exceptions, and existing public records exceptions, as well, be expanded to include consideration of other possible limitation of access factors. These limiting factors may include costs, request procedures and timeliness of responses. See draft legislation in Appendix D.

Expand FOA training to appointed clerks (Pending Legislative Committee discussion and Advisory Committee discussion)

Make improvements to the State's Freedom of Access Website www.maine.gov/foaa

The Advisory Committee recommends that the State's Freedom of Access Website be improved, based on the suggestions made by Sean O'Mara, a third-year student at the Maine School of Law, who served as an extern with the Right to Know Advisory Committee for the Fall Semester of 2010. See Appendix E.

Support establishment of a project to provide FOA services to the public

The Advisory Committee recommends continued support of the effort to provide services concerning the freedom of access laws to the public. Mr. O'Mara developed several options for providing these reference services. See Appendix F.

Continue work on public records exceptions templates, the Criminal History Record Information Act confidentiality/public access provisions, and the myriad of issues involved in public access to bulk records

The Advisory Committee will continue with the development of revised standard drafting templates for statutes that protect information filed in seeking technical or financial assistance from the State. The redraft of the Criminal History Record Information Act prepared by the

Criminal Law Advisory Commission, and the changes recommended by the Judicial Branch's TECRA Implementation Group, should be available for review by the Advisory Committee by the beginning of 2011. Once the courts have resolved the legal questions in the MacImage case, the Advisory Committee will be better able to address the increasingly complex questions about the application of the freedom of access laws to requests for bulk records.

VII. FUTURE PLANS

In 2011, the Right to Know Advisory Committee will continue to provide assistance to the Judiciary Committee relating to proposed legislation affecting public access and the recommendations of the Advisory Committee for existing public records exceptions in Titles 22 through 25. The Advisory Committee looks forward to a full year of activities and working with the Governor, the Legislature and the Chief Justice of the Maine Supreme Judicial Court to implement the recommendations contained in its fourth annual report.

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APPENDIX A

Authorizing Legislation, 1 MRSA §411

DRAFT

APPENDIX B

Membership list, Right to Know Advisory Committee

DRAFT

APPENDIX C

Recommendations for Statutory Changes to Public Records Exceptions, Titles 22 - 25

DRAFT

APPENDIX D

Recommended Draft Legislation

DRAFT

APPENDIX E

Recommendations for improvements to the State's Freedom of Access webpage

DRAFT

APPENDIX F

Options to delivery freedom of access services to the public