

# **RIGHT TO KNOW ADVISORY COMMITTEE**

## **AGENDA**

September 14, 2016

1:00 p.m.

Room 228, State House, Augusta

### **Convene**

1. Welcome and Introductions
2. Public Hearing – Maine’s Freedom of Access Act
3. Review of draft letter to Judiciary Committee regarding public access to personal contact information for professions and occupations licensed by the State
4. Review subcommittee recommendations relating to existing public records exceptions
5. Annual Report – preliminary draft
6. Other issues or questions
7. Future meetings

### **Adjourn**



## NOTICE OF PUBLIC HEARING

The Right to Know Advisory Committee will hold a public hearing at the following time and place:

**September 14, 2016, 1:00 pm**  
**Room 228, State House**  
**Augusta, ME 04333**

The purpose of the hearing is to take comments and suggestions about how the Freedom of Access Act is working and how it might be improved, consistent with its goals of giving citizens adequate access to records and meetings of decision making bodies of government.

Maine's Right to Know Advisory Committee serves as a resource for ensuring compliance with the law and responsibility for a broad range of activities to advance the purposes and principles underlying Maine's Freedom of Access Act. The Freedom of Access Act, which can be found at Title 1, chapter 13 of the Maine Revised Statutes, states the Legislature's intent that public proceedings exist to aid in the conduct of the people's business, that government actions be taken openly, and that the records of government actions be open to public inspection and deliberations be conducted openly. The law provides the public with the right to inspect and copy public records and imposes requirements on government bodies who have received such a request, as well as requiring that bodies of government conduct their meetings in public. The law also provides specific exceptions that allow State and local government bodies to keep certain records or information confidential, or to have executive sessions that are not open to the public during meetings that are otherwise public.

The Advisory Committee requests testimony on the following topic:

**Considering the sensitive nature of certain information held by government entities, how could public access to government meetings and records be improved?**

Written comments may be submitted to:

Donna Hurley  
Office of Policy and Legal Analysis  
Cross Office Building, Room 215  
13 State House Station  
Augusta, ME 04333  
[Donna.hurley@legislature.maine.gov](mailto:Donna.hurley@legislature.maine.gov)

If you plan to testify at the public hearing or to submit comments, the Right to Know Advisory Committee requests that your testimony or comments relate to the following general questions:

- How did you learn about the rights provided in the Freedom of Access Act?
- Did you have questions about how to make a request for a public record, and if so, how did you get answers to them?
- What were you surprised to learn when you made a request for a public record?
- If an issue arose that affected your ability to obtain a public record, how did you attempt to resolve that issue?
- If you are a member of a government body, how does your understanding of the requirements of the Freedom of Access Act differ from the expectations of those making public records requests?
- If you are a member of a government body, do the requirements of the Freedom of Access Act allow you to accomplish your government duties and comply with existing public access requirements and procedures?

This hearing is not a forum for the resolution of specific complaints about meetings or records. The Right to Know Advisory Committee asks that your testimony and comments do not question the motives of others or seek resolution of a particular dispute. Depending upon attendance, the Advisory Committee may limit testimony to a certain duration.

## Fouts, Henry

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**From:** Garrett Corbin <GCorbin@memun.org>  
**Sent:** Thursday, September 01, 2016 11:25 AM  
**To:** McCarthyReid, Colleen; Fouts, Henry  
**Subject:** RTKAC Public Hearing

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

**Categories:** Red Category

Good morning Colleen and Henry,

Writing to let you know that I followed up on the request made by Mary Ann Lynch at the last RTKAC meeting and communicated the hearing notice to our members via our monthly e-newsletter, *MMA This Month*, which went out yesterday. The description from the newsletter is below. Also below is a comment I received from Wells – Lt. Congdon confirmed with me that he would like his email to be submitted as a written comment to the Committee.

Best,  
Garrett

Garrett Corbin  
Legislative Advocate  
Maine Municipal Association  
(207) 624-0108  
[gcorbin@memun.org](mailto:gcorbin@memun.org)

*Newsletter notice:*

### **Commenting on State's Freedom of Access Act**

Maine's Right to Know Advisory Committee will hold a hearing to receive general comments from the public, including municipal officials, on how the Freedom of Access Act is working and how it might be improved. **The hearing is scheduled for Wednesday, Sept. 14 at 1 p.m. in room 228 of the State House in Augusta.** The Committee also accepts written comments. Feel free to contact Garrett Corbin in MMA's State and Federal Relations Dept. at 1-800-452-8786 or [gcorbin@memun.org](mailto:gcorbin@memun.org) if you have questions or suggestions.

The Committee's formal notice advertising this public hearing is [found here](#).

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**From:** Gerald Congdon [<mailto:gcongdon@wellstown.org>]  
**Sent:** Wednesday, August 31, 2016 4:49 PM  
**To:** Garrett Corbin <[GCorbin@memun.org](mailto:GCorbin@memun.org)>  
**Subject:** Freedom of Access Act

It has been my experience that if you ask 3 attorneys or 3 so-called knowledgeable people what can be released in a FOAA request, you will receive that many different answers. I can only speak from a law enforcement officer's perspective so I don't know how it is working in other government sectors. Many people will call and request any/all

reports involving so and so, usually neighbor disputes, people going through divorces and other reasons. Some agencies provide an entire report and others (like us) try to comply as best we can while still following Maine Statutes. My recommendation would be to provide a visual "flow-chart" to guide those of us responsible for responding to these requests to follow. We utilize flow-charts for many purposes and they are easy to follow.

Thanks for listening

*Lt. Gerald Congdon*

Wells Police Department

PO Box 949

Wells, ME 04090

Office: (207) 361 - 8917

Bus: (207) 646 - 9354

11 September 2016

TO: State of Maine Right to Know Committee

RE: *Considering the sensitive nature of certain information held by government entities, how could public access to government meetings and records be improved?*

FROM:

Robin Hadlock Seeley (Pembroke, ME; 207-956-0815)

**1. How did you learn about the rights provided in the Freedom of Access Act?**

**2. Did you have questions about how to make a request for a public record, and if so, how did you get answers to them?**

Yes, I had questions, which were mostly answered by the FAQ on the state website. I read about the rights provided by the Act on the State of Maine website.

**3. What were you surprised to learn when you made a request for a public record?**

- I was most surprised to learn that there is no time limit in the law – that a record holder may take any amount of time to fulfill a request. I have submitted a request to a state agency, for example, in April 2016, and have still not received the records I have requested.

My request was not actually denied, but was as good as denied, since it has been four and a half months since my request was made. The law should include guidelines for a reasonable response time.

- I was also surprised by this: Town officials (municipal boards whose members are appointed by elected officials, and elected officials) are unfamiliar with the FOA Act, including which records are public records, and whether or not town board meetings have to be advertised by a public notice prior to holding the meeting. That surprises me, since I know that elected officials are required to undergo training in the Act.

**4. If an issue arose that affected your ability to obtain a public record, how did you attempt to resolve that issue?**

An issue arose. The issue was the agency responding to my request by supplying the records I requested. I have attempted to deal with it by email correspondence with the Records Officer. It remains unresolved.

Sincerely,

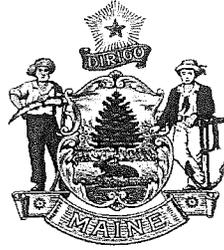


Robin Hadlock Seeley  
292 Leighton Point Road  
Pembroke, ME 04666



Hon. David C. Burns, Chair  
Hon. Kimberly Monaghan  
Suzanne Goucher  
Stephanie Grinnell  
A. J. Higgins  
Richard LaHaye  
Mary Ann Lynch  
Judy Meyer

COPY



Kelly Morgan  
Christopher Parr  
Linda Pistner  
Harry Pringle  
Helen Rankin  
Luke Rossignol  
William Shorey  
Eric Stout

STATE OF MAINE  
RIGHT TO KNOW ADVISORY COMMITTEE

September 14, 2016

Sen. David C. Burns, Senate Chair  
Rep. Barry J. Hobbins, House Chair  
Joint Standing Committee on Judiciary  
100 State House Station  
Augusta, Maine 04333-0100

Dear Sen. Burns and Rep. Hobbins,

At the Judiciary Committee's request, the Right to Know Advisory Committee reviewed the public records exception in current law that protects as confidential records provided by a railroad company describing hazardous materials transported by the railroad company that are in the possession of a state or local emergency management agency or law enforcement agency, a fire department or other first responder. See 1 MRSA §402, sub-§3, ¶U. We understand that your request was prompted by media articles following enactment of the exception indicating that the public's access to information about the transportation of crude oil through the State may be limited and your interest in ensuring that the public have an additional opportunity to comment and, if necessary, to recommend changes to current law.

The Advisory Committee discussed the public records exception and agreed that the exception may benefit from additional consideration. Although the Advisory Committee offers these comments, we recommend that the Judiciary Committee consider submitting a committee bill to the First Regular Session of the 128<sup>th</sup> Legislature so that the current exception may be fully vetted by the Legislature in a manner that allows the most meaningful participation by stakeholders, state and local government entities and other members of the public.

The Advisory Committee believes that the current exception is not intended to prevent public access to summary or aggregate information about the transportation of hazardous materials by rail in the State, particularly crude oil, or to prohibit disclosure of information about spills or discharges of hazardous materials. The Advisory Committee expressed the following concerns about the current exception as written.

- Does public disclosure jeopardize the safety of the public and if so, does that safety interest substantially outweigh the public interest in disclosure of the records?

Sept. 14, 2016

- Does public disclosure disadvantage a business or financial interest and, if so, does that interest substantially outweigh the public interest in disclosure of the records?
- Is the language of the current exception too broad? Is the proposed exception as narrowly tailored as possible? The current law references records describing hazardous materials transported by rail as defined in 49 Code of Federal Regulations 172.101 and represents a table of more than 150 pages identifying hazardous materials subject to the exception. Related federal regulations in 49 Code of Federal Regulations, Part 172, also describe the record-keeping and record retention requirements for the transportation and shipping of hazardous materials.
- Does the current language need to be clarified? Does the exception apply to records possessed by the Department of Environmental Protection that relate only to its function as a “first responder”? Are records held by the DEP that are collected from railroad companies for other purposes subject to the exception?
- Is the exception intended to limit the release of information on a retrospective basis? How long should information be kept confidential?

We are hopeful that we’ve provided enough information to assist you in further evaluating this public records exception. Please feel free to contact us or our committee staff if you have any questions or would like additional input.

Thank you for your consideration.

Sincerely,

Sen. David C. Burns, Chair  
Right to Know Advisory Committee

cc: Members, Right to Know Advisory Committee  
Members, Joint Standing Committee on Judiciary  
Margaret Reinsch, Office of Policy and Legal Analysis

FOR RTKAC REVIEW  
9/14/16

Hon. David C. Burns, Chair  
Hon. Kimberly Monaghan  
Suzanne Goucher  
Stephanie Grinnell  
A. J. Higgins  
Richard LaHaye  
Mary Ann Lynch  
Judy Meyer

Kelly Morgan  
Christopher Parr  
Linda Pistner  
Harry Pringle  
Helen Rankin  
Luke Rossignol  
William Shorey  
Eric Stout



STATE OF MAINE  
RIGHT TO KNOW ADVISORY COMMITTEE

{date}

Sen. David C. Burns, Senate Chair  
Rep. Barry J. Hobbins, House Chair  
Joint Standing Committee on Judiciary  
100 State House Station  
Augusta, Maine 04333-0100

Dear Sen. Burns and Rep. Hobbins,

The Right to Know Advisory Committee has had extensive discussions about your request that the Advisory Committee develop comprehensive recommendations for the treatment of personal contact information for professions and occupations regulated by the State. During the Second Regular Session, the Legislature enacted LD 1499, An Act to Increase the Safety of Social Workers”, which created a new confidentiality provision for social worker licensees’ and license applicants’ addresses and telephone numbers. In response to suggestions to include other types of licensed professionals in the scope of the confidentiality exception, we understand you have asked for the Advisory Committee’s assistance in developing a uniform policy for all professions and occupations. Under current law, some licensing boards, e.g., nurses, physicians and osteopaths, make certain licensee information confidential already.

The Advisory Committee agreed that any uniform policy needs to balance the consumer interests of the public in having access to licensee information with the privacy interests of licensees and license applicants. The public has a legitimate need for access to licensing information to ensure that individuals employed in certain professions and occupations are adequately trained and competent, but licensed professionals also have an interest in privacy and personal safety.

The Advisory Committee recommends *(by a vote of 11-2)* an approach that focuses on what categories of personal information about licensees should not be accessible to the public, rather than specifying what licensing information should be public. The Advisory Committee supports the general principle that personal contact information should not be public, similar to the criteria at 1 MRSA §402, sub-§3, ¶O for protecting public employee personal information. Pursuant to 1 MRSA §402, sub-§3, ¶O, the home addresses, home phone and fax numbers, personal cellphone numbers and home email addresses are confidential. The Advisory Committee recognizes that, in cases in which the licensee or license applicant has only provided a personal address and not a public business address to a licensing board, the personal address should not be kept confidential.

The Advisory Committee also discussed the merits of providing licensees and license applicants an approach that would permit individuals to opt-in or affirmatively approve the disclosure of personal contact information or developing a form for use by the licensing entity that would make public certain information, but would exclude personal information about the individual from being disclosed to the public.

We are hopeful that we've provided enough guidance to assist you in evaluating proposed legislation regarding the confidentiality of personal contact information for professional and occupational licensees and applicants for those licenses. Please feel free to contact us or our committee staff if you have any questions or would like additional input.

Thank you for your consideration.

Sincerely,

Sen. David C. Burns, Chair  
Right to Know Advisory Committee

cc: Right to Know Advisory Committee

## Right to Know Advisory Committee

### *DRAFT* Proposed Bill to Implement the Recommendations of the Public Records Exceptions Review Subcommittee

#### An Act to Implement Recommendations of the Right to Know Advisory Committee Regarding Public Records Exceptions

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

**Sec. 1.** 1 MRSA §402, sub-§3, ¶C-1 is amended to read:

C-1. ~~Information contained in~~ Records that are a communication between a constituent and an elected official if the ~~information~~ communication contains any of the following information that:

(1) Is of a personal nature, consisting of:

- (a) An individual's medical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders;
- (b) Credit or financial information;
- (c) Information pertaining to the personal history, general character or conduct of the constituent or any member of the constituent's immediate family;
- (d) Complaints, charges of misconduct, replies to complaints or charges of misconduct or memoranda or other materials pertaining to disciplinary action; or
- (e) An individual's social security number; or

(2) Would be confidential if it were in the possession of another public agency or official;

Notwithstanding this paragraph, the records described in this paragraph are public records if the information described in subparagraphs (1) and (2) may be redacted without significant effort by the agency or public official having custody or control of the record and such redactions are made prior to public release.

**Sec. 2.** 1 MRSA §402, sub-§3, ¶V is enacted to read:

V. Records containing any of the following information:

(1) Information of a personal nature, consisting of:

- (a) An individual's medical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders;
- (b) Credit or financial information;
- (c) Information pertaining to the personal history, general character or conduct of an individual or any member of the individual's immediate family;

(d) Complaints, charges of misconduct, replies to complaints or charges of misconduct or memoranda or other materials pertaining to disciplinary action; or

(e) An individual's social security number; or

(2) Information that would be confidential if it were in the possession of another public agency or official.

## **SUMMARY**

This bill amends Maine's Freedom of Access Act by amending an exception to the definition of public records covered by the Act. The current exception for certain personal information contained in a communication between a legislator and constituent is broadened to exclude the entire record of the communication, as opposed to the personal information contained in the communication. The record of this communication may be a public record, provided the agency or public official may easily redact the private information from the record and does in fact do so prior to release of such records to the public.

It also adds a new exception to the definition of public records covered by the Freedom of Access Act for any records that contain any certain personal information.

**29-A M.R.S.A. §1301, sub §6-A is amended to read:**

**6-A. Confidentiality.** Except as ~~authorized under~~ required by 18 United States Code, Section 2721(b), the Secretary of State may not disseminate information collected under subsection 6. ~~to any entity without specific authorization from the Legislature.~~ For every willful violation of this subsection, a person commits a civil violation for which a fine of not more than \$500 may be adjudged.



## Fouts, Henry

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**From:** Nale, Craig  
**Sent:** Tuesday, September 13, 2016 10:14 AM  
**To:** Fouts, Henry  
**Subject:** FW: SSNs and FOAA  
**Attachments:** 29MRSA §1301 sub §6-A amendment.doc

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

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**From:** Redmond, Barbara [<mailto:Barbara.Redmond@maine.gov>]  
**Sent:** Tuesday, September 13, 2016 7:49 AM  
**To:** Nale, Craig  
**Cc:** Muszynski, Kristen; Morneault, Patty; O'Connell, Robert  
**Subject:** RE: SSNs and FOAA

Hi Craig,

Attached is the amendment to 29-A MRSA § 1301, sub§-6A. Bob O'Connell, or someone from the dept. will be there to answer any questions that the committee may have. I'll let you know later today who it will be if Bob is not available.

Best,  
Barbie

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**From:** Nale, Craig [<mailto:Craig.Nale@legislature.maine.gov>]  
**Sent:** Monday, September 12, 2016 4:49 PM  
**To:** Redmond, Barbara  
**Subject:** RE: SSNs and FOAA

Hi Barbie,

Thanks again for your help. We'll let the Advisory Committee know that the Secretary of State's office recommends repeal of paragraph R (the specific exemption), and that you recommend no change to 29-A MRSA § 1301, sub-§6-A. They are meeting on Wednesday, September 14 at 1:00 (they have a public hearing scheduled, but will likely also get to this later in the afternoon).

Best,  
Craig

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**From:** Redmond, Barbara [<mailto:Barbara.Redmond@maine.gov>]  
**Sent:** Friday, September 09, 2016 3:11 PM  
**To:** Fouts, Henry  
**Cc:** Muszynski, Kristen; Nale, Craig; Morneault, Patty; O'Connell, Robert  
**Subject:** RE: SSNs and FOAA

Hi Henry,

We've looked at the exceptions and find no real need for the specific exemption for the SOS in sub-§R. The language in 29-A MRSA § 1301, sub 6-A covers confidentiality of SSNs at the BMV and we are planning to clean up that language during the next legislative session.

I suggest the general exception in N remain on the books, unless you can ascertain that there are no laws or state rules that reference it. Here's an example from Title 21-A (in part):

### **§196-A. Use and distribution of central voter registration system information**

1. Access to data from the central voter registration system. For the purposes of Title 1, section 402, information contained electronically in the central voter registration system and any information or reports generated by the system are confidential and may be accessed only by municipal and state election officials for the purposes of election and voter registration administration, and by others only as provided in this section.

I hope this helps.

Best,  
Barbie

**Barbara A. Redmond**, Chief Deputy Secretary of State  
Office of the Secretary of State | 148 State House Station | Augusta, ME 04333-0148  
Tel: 207-626-8400 | Fax: 207-287-8598 | TTY users call Maine Relay 711  
[www.maine.gov/sos](http://www.maine.gov/sos) | [Facebook](#)

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**From:** Nale, Craig [<mailto:Craig.Nale@legislature.maine.gov>]  
**Sent:** Wednesday, August 24, 2016 3:43 PM  
**To:** Redmond, Barbara  
**Cc:** Fouts, Henry; Muszynski, Kristen  
**Subject:** FW: SSNs and FOAA

Hi Barbie:

Thanks for speaking with me about the issue below this afternoon. Again, I'll be out of the office for a while before the Right to Know Advisory Committee meets on September 14, so in the meantime if you uncover anything further please feel free to get in touch with Henry Fouts.

Best,  
Craig

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**From:** Nale, Craig  
**Sent:** Wednesday, August 24, 2016 11:59 AM  
**To:** Muszynski, Kristen  
**Cc:** Fouts, Henry  
**Subject:** SSNs and FOAA

Hi Kristen,

Thank you again for your help gathering information for the Right to Know Advisory Committee's review of existing public records exceptions. Based on the SOS's response, which included a paragraph with some concerns from your legal counsel at BMV, the RTKAC would like to clean up the provisions affecting SSNs in Title 1 and Title 29-A that would affect the SOS's office. I've attached a copy of your response because it's been a few months since we last communicated.

My understanding is that 29-A MRSA § 1301 allows disclosure of SSNs pursuant to the federal Driver Privacy Protection Act, and that 1 MRSA § 402(3)(N) & (R) define SSNs generally (¶N) and SSNs in the possession of the Secretary of State (¶R) as not “public records.” (Because SSNs aren’t made confidential anywhere by statute, the ability to disclose SSNs pursuant to the Driver Privacy Protection Act isn’t affected, but the Secretary of State doesn’t have to release a SSN to a person making a request for a SSN because it is not a “public record.”)

I have looked back at the enactment of ¶R and did not find testimony or other rationale for what seems like a redundant exception for SSNs: the RTKAC questions whether there is any need for the general exception for SSNs at ¶N as well as the more specific exception at ¶R.

I’d be happy to speak with you or someone at BMV about this; however tomorrow (Thursday, August 25) is my last day in the office until the beginning of September. If no one is available to speak today or tomorrow, please instead contact Henry Fouts (copied here), who also staffs the Right to Know Advisory Committee.

Thanks,  
Craig

Craig T. Nale, Esq.  
Legislative Analyst  
Office of Policy and Legal Analysis  
Maine State Legislature  
13 State House Station, Augusta, ME 04330  
(207) 287-1670  
[craig.nale@legislature.maine.gov](mailto:craig.nale@legislature.maine.gov)



Hon. David C. Burns, Chair  
Hon. Kimberly Monaghan  
Suzanne Goucher  
Stephanie Grinnell  
A. J. Higgins  
Richard LaHaye  
Mary Ann Lynch  
Judy Meyer  
Kelly Morgan



Paul Nicklas  
Christopher Parr  
Linda Pistner  
Harry Pringle  
Helen Rankin  
Luke Rossignol  
William Shorey  
Eric Stout

STATE OF MAINE  
**RIGHT TO KNOW ADVISORY COMMITTEE**

September 12, 2016

Chandler E. Woodcock, Commissioner  
Department of Inland Fisheries and Wildlife  
41 State House Station  
Augusta, ME 04333

Dear Commissioner Woodcock:

The Right to Know Advisory Committee recently considered a request by the Department of Inland Fisheries and Wildlife to consider a revision to the language of Title 12, section 10110 of the Maine Revised Statutes. We thank you and your staff for your input; however, we are concerned about the scope of the proposed amendment and feel this matter may be better resolved by the Joint Standing Committee on Inland Fisheries and Wildlife of the Legislature.

The Advisory Committee first sought input from the Department on this provision of law, which pertains to the confidentiality of email address submitted to the Department, as part of our annual review of existing public records exceptions. The Department initially supported the continuation of the exception without change, but we sought further guidance about the merits of a blanket confidentiality provision for email address versus providing confidentiality only upon request.

The resulting proposed amendment provided confidentiality for email address submitted as part of an application for any license, permit or registration issued by the Department unless the applicant clearly indicated that the email address is not confidential. In addition, the proposed amendment included new exceptions to email confidentiality for contractors or other State agencies performing marketing services for the Department or conducting fish and game management research. A copy of the draft amendment the Advisory Committee considered is attached for your reference.

While we support the default confidentiality of email addresses for license, permit and registration applicants, as well as the possibility of a person indicating that his or her email address is not confidential, we do not feel we have sufficient information or understanding of the scope of the proposed exceptions to make a recommendation on that portion of your proposal.

We hope you will consider submitting a bill to effect changes to this provision to the 128th Legislature.

Sincerely,

Sen. David C. Burns, Chair  
Right to Know Advisory Committee



**PUBLIC RECORDS EXCEPTIONS SUBCOMMITTEE**

**Maine Freedom of Access Act - public records exceptions**

**Enacted 2005 - 2012**

(Revised 9/14/2016)

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
1	1	402	2	Title 1, section 402, subsection 2, paragraph G, relating to committee meetings pertaining to interscholastic sports	Maine Principal's Association - Interscholastic Management Committee	Indefinitely postpone because this is a public meetings exception	Accepted Subcommittee recommendation
2	1	402	3	Title 1, section 402, subsection 3, paragraph C-1, relating to legislative working papers	Legislative Council, Executive Director	5-1 No Modification; amendments	
3	1	402	3	Title 1, section 402, subsection 3, paragraph N, relating to Social Security Numbers	Department of Administrative and Financial Services - Bureau of Human Resources; Legislative Council, Executive Director; Administrative Office of the Courts	No Modification	Accepted Subcommittee recommendation
4	1	402	3	Title 1, section 402, subsection 3, paragraph O, relating to personal contact information concerning public employees other than elected officials	Department of Administrative and Financial Services - Bureau of Human Resources; Legislative Council, Executive Director; Administrative Office of the Courts	No Modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
5	1	402	3	Title 1, section 402, subsection 3, paragraph P, relating to geographic information regarding recreational trails on private land	Department of Inland Fisheries and Wildlife; Department of Agriculture, Conservation and Forestry	No Modification	Accepted Subcommittee recommendation
6	1	402	3	Title 1, section 402, subsection 3, paragraph Q, relating to security plans, staffing plans, security procedures, architectural drawings or risk assessments prepared for emergency events for Department of Corrections or county jail	Department of Corrections	No Modification	
7	1	402	3	Title 1, section 402, subsection 3, paragraph R, relating to Social Security numbers in possession of the Secretary of State	Secretary of State	No Modification	Tabled to check with SOS.
8	1	538	3	Title 1, section 538, subsection 3, relating to InforME subscriber information	Information Resources of Maine (InforME)	No Modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
9	1	1013	2	Title 1, section 1013, subsection 2, relating to the identity of a requestor of Commission on Governmental Ethics and Election Practices opinions	Commission on Governmental Ethics and Election Practices	No Modification	Accepted Subcommittee recommendation
10	1	1013	4	Title 1, section 1013, subsection 4, relating to Commission on Governmental Ethics and Election Practices records other than complaints	Commission on Governmental Ethics and Election Practices	No Modification	Accepted Subcommittee recommendation
11	1	1013	3-A	Title 1, section 1013, subsection 3-A, relating to complaint alleging a violation of legislative ethics	Commission on Governmental Ethics and Election Practices	No Modification	Accepted Subcommittee recommendation
12	4	1806		Title 4, section 1806, relating to certain information and records in the possession of the Maine Commission on Indigent Legal Services	Maine Commission on Indigent Legal Services	No Modification	Accepted Subcommittee recommendation
13	5	1541	10-B	Title 5, section 1541, subsection 10-B, relating to internal audit working papers of the State Controller	Department of Administrative and Financial Services - Office of the State Controller	Tabled to check again with FOAA contact	

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
14	5	17057	3	Title 5, section 17057, subsection 3, relating to home contact information of Maine Public Employees Retirement System members, benefit recipients and staff	Maine Public Employees Retirement System	No Modification	Accepted Subcommittee recommendation
15	5	17057	4	Title 5, section 17057, subsection 4, relating to Maine Public Employees Retirement System private market investment activity	Maine Public Employees Retirement System	No Modification	Accepted Subcommittee recommendation
16	5	17057	5	Title 5, section 17057, subsection 3, relating to Maine Public Employees Retirement System employees personal and complaint and disciplinary information	Maine Public Employees Retirement System	No Modification	Accepted Subcommittee recommendation
17	5	90-B	7	Title 5, section 90-B, subsection 7, relating to the Address Confidentiality Program	Secretary of State	No Modification	Accepted Subcommittee recommendation
18	7	1052	2-A	Title 7, section 1052, subsection 2-A, relating to total potential acreage of genetically modified crops reported by individual manufacturers	Department of Agriculture, Conservation and Forestry	No Modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
19	7	2231	3	Title 7, section 2231, subsection 3, relating to criminal history records provided to the Commissioner of Agriculture, Conservation and Forestry as part of an application to grow industrial hemp for commercial purposes	Department of Agriculture, Conservation and Forestry	Repealed by PL 2009, ch. 320, section 1	Accepted Subcommittee recommendation
20	8	1006	1	Title 8, section 1006, subsection 1, paragraph A, relating to information or records required by the Gambling Control Board for licensure: trade secrets and proprietary information	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
21	8	1006	1	Title 8, section 1006, subsection 1, paragraph B, relating to information or records required by the Gambling Control Board for licensure: would be unwarranted invasion of privacy of key executive, gaming employee or another person	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
22	8	1006	1	Title 8, section 1006, subsection 1, paragraph C, relating to information or records required by the Gambling Control Board for licensure: key executive or gaming employee compensation	Department of Public Safety	No Modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
23	8	1006	1	Title 8, section 1006, subsection 1, paragraph D, relating to information or records required by the Gambling Control Board for licensure: financial, statistical and surveillance information related to the applicant	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
24	8	1006	1	Title 8, section 1006, subsection 1, paragraph E, relating to information or records required by the Gambling Control Board for licensure: creditworthiness, credit rating or financial condition of person or project	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
25	8	1006	1	Title 8, section 1006, subsection 1, paragraph F, relating to information or records required by the Gambling Control Board for licensure: information from other jurisdictions conditioned on remaining confidential	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
26	8	1006	1	Title 8, section 1006, subsection 1, paragraph G, relating to information or records required by the Gambling Control Board for licensure: information designated confidential under federal law	Department of Public Safety	No Modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
27	8	1006	1	Title 8, section 1006, subsection 1, paragraph H, relating to information or records required by the Gambling Control Board for licensure: specific personal information, including Social Security number, of any individual	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
28	8	1006	3	Title 8, section 1006, subsection 3, relating to records and information developed as part of suitability requirement to select operator of central site monitoring system, held by Gambling Control Board and Dept. of Public Safety	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
29	8	1006	4	Title 8, section 1006, subsection 4, relating to financial, statistical and surveillance information from the central site monitoring system held by the Gambling Control Board and the Dept. of Public Safety	Department of Public Safety	No Modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
30	8	1007	2	Title 8, section 1007, subsection 2, relating to information or records received by the Gambling Control Board or Department of Public Safety from another agency pursuant to agreement	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
31	8	1008		Title 8, section 1008, relating to information or records used or produced by the Gambling Control Board or Department of Public Safety in connection with hearings, proceedings or appeals pursuant to Title 8, section 1052	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
32	8	1052		Title 8, section 1052, relating to reports, information or records compiled by the Gambling Control Board and Dept. of Public Safety concerning noncompliance with or violation of the chapter by an applicant, licensee, owner or key executive	Department of Public Safety	No Modification	Accepted Subcommittee recommendation
33	8	270-A		Title 8, section 270-A, relating to records and information included in application or materials required for issuance of commercial track license	Department of Agriculture, Conservation and Forestry	No Modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
34	9-A	6-105-A		Title 9-A, section 6-105-A, last paragraph, relating to information concerning uniform multistate licensing system provided to Consumer Credit Protection by other jurisdictions	Department of Professional and Financial Regulation - Bureau of Consumer Credit Protection	No Modification	Accepted Subcommittee recommendation
35	12	8005	1	Title 12, section 8005, subsection 1, relating to Social Security numbers, addresses, telephone numbers, electronic mail addresses of forest landowners owning less than 1,000 acres	Department of Agriculture, Conservation and Forestry	No Modification	Accepted Subcommittee recommendation
36	12	8005	2	Title 12, section 8005, subsection 2, relating to Social Security numbers, forest management plans and supporting documents of activities for administering landowner assistance programs	Department of Agriculture, Conservation and Forestry	No Modification	
37	12	8005	4	Title 12, section 8005, subsection 4, relating to forest management information designated confidential by agency furnishing the information	Department of Agriculture, Conservation and Forestry	5-1 No Modification	

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
38	12	10110		Title 12, section 10110, relating to a person's e-mail address submitted as part of the application process for a hunting or fishing license	Department of Inland Fisheries and Wildlife	No Modification; Send letter to IFW Committee expressing approval of opt-in language from DIFW but concern about marketing and contractors language	
39	12	12551-A	10	Title 12, section 12551-A, subsection 10, relating to smelt dealers reports, including name, location, gear and catch	Department of Inland Fisheries and Wildlife	No Modification	
40	14	6321-A	4	Title 14, section 6321-A, subsection 4, relating to the financial information disclosed in the course of mediation under the foreclosure mediation program	Administrative Office of the Courts	No Modification	
41	17-A	1176	1	Title 17-A, section 1176, subsection 1, relating to information that pertains to current address or location of crime victims	Department of Public Safety	No Modification	

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
42	17-A	1176	5	Title 17-A, section 1176, subsection 5, relating to request by crime victim for notice of release of defendant	Department of Corrections	No Modification	
43	20-A	13004	2-A	Title 20-A, section 13004, subsection 2-A, relating to complaints, charges and accusations concerning certification and registration of educational personnel	Department of Education	Review with full Advisory Committee	
44	21-A	1003	3-A	Title 21-A, section 1003, subsection 3-A, relating to investigative working papers of the Commission on Governmental Ethics and Election Practices	Maine Commission on Governmental Ethics and Election Practices	No Modification	Accepted Subcommittee recommendation
45	21-A	1125	3	Title 21-A, section 1125, subsection 3, relating to records of individuals who made Clean Elections qualifying contributions over the Internet	Maine Commission on Governmental Ethics and Election Practices	No Modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
46	21-A	1125	2-B	Title 21-A, section 1125, subsection 2-B, relating to records of individuals who made Clean Elections gubernatorial seed money contributions over the Internet	Maine Commission on Governmental Ethics and Election Practices	Indefinitely postpone because citizen's initiation repeals this exception	Accepted Subcommittee recommendation
47	21-A	196-A		Title 21-A, section 196-A, relating to information contained electronically in the central voter registration system	Secretary of State	No Modification	Accepted Subcommittee recommendation
48	22	1494		Title 22, section 1494, relating to occupational disease reporting	Department of Health and Human Services	No Modification	Accepted Subcommittee recommendation
49	22	2425	8	Title 22, section 2425, subsection 8, relating to medical marijuana registry identification cards	Department of Health and Human Services	No Modification	Accepted Subcommittee recommendation
50	22	1711-C	20	Title 22, section 1711-C, subsection 20, relating to hospital records concerning health care information pertaining to an individual	HealthInfoNet	Repeal because information is already adequately protected and FOAA doesn't apply to HealthInfoNet	Tabled

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
51	22	2153-A		Title 22, section 2153-A, relating to information provided to the Department of Health and Human Services by the U.S. Department of Agriculture and the U.S. Food and Drug Administration that is confidential under federal law	Department of Health and Human Services	Tabled 8/17; review response from ACF on 9/14	
52	22	4087-A	6	Title 22, section 4087-A, subsection 6, relating to information held by or records or case-specific reports maintained by the Child Welfare Ombudsman	Child Welfare Ombudsman	No Modification	Accepted Subcommittee recommendation
53	24-A	2736	2	Title 24-A, section 2736, subsection 2, relating to insurer rate filings on individual health insurance policies and supporting information, in regards to protected health information and descriptions of the amount and terms or conditions or reimbursement in a contract between an insurer and a 3rd party	Department of Professional and Financial Regulation - Bureau of Insurance	No review. Not a new PR exception.	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
54	25	4202		Title 25, section 4202, relating to records and information connected in any way with the work of a critical incident stress management team for law enforcement personnel	Department of Public Safety		
55	29-A	1301	6-A	Title 29-A, section 1301, relating to the social security number of an applicant for a driver's license or nondriver identification card	Secretary of State	No Modification	Tabled to check with SOS.
56	29-A	2251	7-A	Title 29-A, section 2251, subsection 7-A, relating to personally identifying accident report data contained in an accident report database	Department of Public Safety		
57	29-A	2117-A	4	Title 29-A, section 2117-A, relating to data collected or retained through the use of an automated license plate recognition system	Department of Public Safety; Department of Transportation		
58	32	91-B	1	Title 32, section 91-B, subsection 1, relating to quality assurance activities of an emergency medical services quality assurance committee	Department of Public Safety		

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
59	32	91-B	1	Title 32, section 91-B, subsection 1, paragraph A, relating to personal contact information and personal health information of applicant for credentialing by Emergency Medical Services Board	Department of Public Safety		
60	32	91-B	1	Title 32, section 91-B, subsection 1, paragraph B, relating to information about a person receiving emergency medical services as part of an application for credentialing by Emergency Medical Services Board	Department of Public Safety		
61	32	91-B	1	Title 32, section 91-B, subsection 1, paragraph C, relating to information submitted to the trauma incidence registry under section 97-B	Department of Public Safety		
62	32	91-B	1	Title 32, section 91-B, subsection 1, paragraph D, relating to examination questions used for credentialing by Emergency Medical Services Board	Department of Public Safety		

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
63	30-A	4706	1	Title 30-A, section 4706, subsection 1, relating to municipal housing authorities	Maine State Housing Authority (MaineHousing)	No Modification	Accepted Subcommittee recommendation
64	34-A	11221	13	Title 34-A, section 11221, subsection 13, relating to disclosure of certain sex offender registry information	Department of Public Safety		
65	34-A	11221	9-A	Title 34-A, section 11221, subsection 9-A, relating to certain sex offender registry information	Department of Public Safety		
66	34-B	1931	6	Title 34-B, section 1931, subsection 6, relating to the records of the Mental Health Homicide, Suicide and Aggravated Assault Review Board	Mental Health Homicide, Suicide, and Aggravated Assault Review Board (MHSAARB)		
67	34-B	3864	12	Title 34-B, section 3864, subsection 12, relating to abstract of involuntary commitment order provided to State Bureau of Identification	Department of Public Safety		

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
68	35-A	122	1-B	Title 35-A, section 122, subsection 1-B, paragraph G, relating to information, as it pertains to the sale, lease or use of state-owned land or assets under the provisions of this subsection or activities in preparation for such sale, lease or use in the context of energy infrastructure corridors	Interagency Review Panel (Governor's Energy Office)	No Modification	Accepted Subcommittee recommendation
69	35-A	10106		Title 35-A, section 10106 relating to records of the Efficiency Maine Trust and its board	Efficiency Maine		
70	36	6271	2	Title 36, section 6271, subsection 2, relating to an application, information submitted in support of an application and files and communications in relation to a municipal property tax deferral program for senior citizens	Maine Municipal Association	No Modification	Accepted Subcommittee recommendation

Ref. #	M.R.S. TITLE	§	Sub-§	DESCRIPTION	DEPARTMENT/AGENCY	SUBCOMMITTEE RECOMMENDATIONS	AC RECOMMENDATION
71	38	1310-B	2	Title 38, section 1310-B, subsection 2, relating to hazardous waste information, information on mercury-added products and electronic devices and mercury reduction plans	Department of Environmental Protection	No Modification	Accepted Subcommittee recommendation
72	38	580-B	11	Title 38, section 580-B, subsection 11, relating to records held by the Department of Environmental Protection or its agents regarding individual auctions administered under the carbon dioxide cap-and-trade program	Department of Environmental Protection	No Modification	Accepted Subcommittee recommendation



**STATE OF MAINE  
128th LEGISLATURE  
FIRST REGULAR SESSION**

**Eleventh Annual Report  
of the  
Right to Know Advisory Committee**

**January 2017**

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*[to be added]*

**DRAFT**

## I. INTRODUCTION

This is the eleventh 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 Advisory Committee's authorizing legislation, located at Title 1, section 411, is included in **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](http://www.maine.gov/legis/opla/righttoknowreports.htm).

The Right to Know Advisory Committee has 17 members. The chair of the Advisory Committee is elected annually by the members. Current Advisory Committee members are:

Sen. David C. Burns Chair	<i>Senate member of Judiciary Committee, appointed by the President of the Senate</i>
Rep. Kimberly Monaghan	<i>House member of Judiciary Committee, appointed by the Speaker of the House</i>
Suzanne Goucher	<i>Representing broadcasting interests, appointed by the Speaker of the House</i>
Stephanie Grinnell	<i>Representing newspaper and other press interests, appointed by the President of the Senate</i>
A.J. Higgins	<i>Representing broadcasting interests, appointed by the President of the Senate</i>
Richard LaHaye	<i>Representing law enforcement interests, appointed by the President of the Senate</i>
Mary Ann Lynch	<i>Representing the Judicial Branch, designated by the Chief Justice of the Supreme Judicial Court</i>
Judy Meyer	<i>Representing newspaper publishers, appointed by the Speaker of the House</i>
Kelly Morgan	<i>Representing a statewide coalition of advocates of freedom of access, appointed by the Speaker of the House</i>
Paul Nicklas	<i>Representing municipal interests, appointed by the Governor [appointed effective September 15, 2016]</i>
Christopher Parr	<i>Representing state government interests, appointed by the Governor</i>

Linda Pistner	<i>Attorney General's designee</i>
Harry Pringle	<i>Representing school interests, appointed by the Governor</i>
Helen Rankin	<i>Representing the public, appointed by the Speaker of the House</i>
Luke Rossignol	<i>Representing the public, appointed by the President of the Senate</i>
William Shorey	<i>Representing county or regional interests, appointed by the President of the Senate</i>
Eric Stout	<i>A member with broad experience in and understanding of issues and costs in multiple areas of information technology, appointed by the Governor</i>

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

## II. 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 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. The Advisory Committee is pleased to work with the Public Access Ombudsman, Brenda Kielty. Ms. Kielty is a valuable resource to the public and public officials and agencies.

By law, the Advisory Committee must meet at least four times per year. During 2016, the Advisory Committee met on June 22, July 20, August 17, September 14 and October \_\_\_\_\_. On September 14, 2016, the Advisory Committee held a public hearing to take comments and suggestions about how the Freedom of Access Act is working and how it might be improved, consistent with its goals of giving citizens adequate access to records and meetings of decision making bodies of government. The Advisory Committee specifically requested testimony on the following topic: *Considering the sensitive nature of certain information held by government entities, how could public access to government meetings and records be improved?* Each meeting was open to the public and was also accessible through the audio link on the Legislature's webpage.

The Advisory Committee has also established a webpage, which can be found at [www.maine.gov/legis/opla/righttoknow.htm](http://www.maine.gov/legis/opla/righttoknow.htm). Agendas, meeting materials and summaries of the meetings are available on the webpage.

### **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 recent developments in case law relating to Maine's freedom of access laws. For its eleventh annual report, the Advisory Committee has identified and summarized the following Maine Supreme Judicial Court decision related to freedom of access issues.

#### **Hughes Bros. v. Town of Eddington**

In *Hughes Bros. v. Town of Eddington*, 2016 ME 13, 130 A.3d 978, Hughes Bros., Inc., a landowner seeking a permit to create a quarry, appealed a Superior Court decision determining that the Town of Eddington conducted a valid executive session for the purpose of consulting with counsel. The landowner sought an injunction directing the town to cease and desist from holding a public vote on proposed moratorium on quarries, and a declaration that any moratorium that might be approved was void because town violated open meeting requirements of Freedom of Access Act (FOAA) by holding a joint executive session of the board of selectmen and planning board. The Law Court held that the boards conducted a valid executive session, invoked for purpose of consulting with legal counsel regarding wording in proposed moratorium ordinance, and that FOAA does not prohibit municipal boards from holding executive sessions jointly in order to meet with legal counsel about how to comply with the law in carrying out their prospective duties.

In order for an executive session to be valid under FOAA, the following elements must be present: the executive session must be publicly announced; the purpose of the executive session must be permitted by law and described clearly; the executive session must be confined to statutorily authorized matters; it may not include any final approval of any official action; and records must be kept that are adequate for purposes of judicial review if an action is challenged. In this case, the administrative record demonstrated that the Town met its burden to show that all of these elements were present. The executive session was held for the limited and authorized purpose of consulting with counsel to draft a legally sound proposed ordinance for consideration at a later public meeting and the municipal ordinance was approved after consultation with counsel and public deliberation and vote in a meeting open to the public. And further, the Law Court stated that FOAA contains no prohibition against municipal boards holding joint executive sessions and the mere fact that boards share in the advice of counsel in a combined executive session is not a violation of FOAA.

#### **IV. RIGHT TO KNOW ADVISORY COMMITTEE SUBCOMMITTEE**

In prior years, the Right to Know Advisory Committee has divided its workload among various subcommittees that have reported recommendations back to the full Advisory Committee for consideration and action. In 2016, the Advisory Committee chose to appoint one subcommittee: the Public Records Exceptions Subcommittee. The Public Records Exceptions Subcommittee's focus is to review and evaluate public records exceptions as required of the Advisory Committee pursuant to 1 MRSA §433, sub-§2-A. The guidelines in the law require the Advisory Committee to review all public records exceptions enacted after 2004 and before 2013 no later than 2017.

As part of its review, the Subcommittee reached out to state and local bodies for information, comments and suggestions with respect to the relevant public records exceptions administered by that body. All inquiries to the public bodies were coupled with an invitation for a representative of the public body to attend the Subcommittee meeting to provide any additional information or answer questions from the Subcommittee. Review was undertaken in light of the criteria codified at 1 MRSA §434, and, after discussion and a vote, recommendations for either keeping a provision with no modification or otherwise striking or amending the provision were passed along to the full Advisory Committee for a final vote. Representative Monaghan was the chair of the Subcommittee and A.J. Higgins, Mary Ann Lynch, Chris Parr, Linda Pistner, Helen

Rankin and Eric Stout served as members. As a legislator and the Advisory Committee chair, Senator Burns was an ex officio member.

**Exceptions reviewed by the Subcommittee in 2015, but considered by the full Advisory Committee in 2016:** The following exceptions were reviewed by the Subcommittee at its December 1, 2015 meeting, but were not able to be considered by the full Advisory Committee until 2016. The recommendations are summarized below.

*Note: Reference numbers below are based on a spreadsheet of public records exceptions created by staff to facilitate the review. The spreadsheet is available on the Right to Advisory Committee's website, [www.maine.gov/legis/opla/righttoknow.htm](http://www.maine.gov/legis/opla/righttoknow.htm).)*

Ref# 4: 1 M.R.S. §402, Sub-§3, ¶O, relating to personal contact information concerning public employees other than elected officials

The Subcommittee voted 4-0 to recommend no modification.

Ref# 9: 1 M.R.S. §1013, Sub-§2, relating to the identity of a requestor of Commission on Governmental Ethics and Election Practices opinions

The Subcommittee voted 3-0 to recommend no modification. According to the Ethics Commission this exception has not been used in the last 13 years, so they believe the exception is clear. The exception is important due to the sensitive nature of this information.

Ref# 10: 1 M.R.S. §1013, Sub-§4, relating to Commission on Governmental Ethics and Election Practices records other than complaints

The Subcommittee voted 3-0 to recommend no modification.

Ref# 11: 1 M.R.S. §1013, Sub-§3-A, relating to complaint alleging a violation of legislative ethics

The Subcommittee voted 3-0 to recommend no modification.

Ref# 38: 12 MRSA §10110, relating to a person's e-mail address submitted as part of the application process for a hunting or fishing license

The Subcommittee voted to table this item.

Ref# 44: 21-A M.R.S. §1003, Sub-§3-A, relating to investigative working papers of the Commission on Governmental Ethics and Election Practices

The Subcommittee voted 4-0 to recommend no modification.

Ref# 45: 21-A M.R.S. §1125, Sub-§3, relating to records of individuals who made Clean Elections qualifying contributions over the Internet

The Subcommittee voted 4-0 to recommend no modification. The exception involves financial information not ordinarily available to the public.

Ref# 46: 21-A M.R.S. §1125, Sub-§2-B, relating to records of individuals who made Clean Elections gubernatorial seed money contributions over the Internet

The Subcommittee voted 4-0 to indefinitely postpone this item, as a recently passed citizen initiative repeals this provision.

Ref# 47: 21-A M.R.S. §196-A, relating to information contained electronically in the central voter registration system

The Subcommittee voted 4-0 to recommend no modification. A representative of the Department of the Secretary of State appeared before the Subcommittee and explained the need for the continuation of this exception for central voter registration system data. The Department had asked the Legislature for this provision because FOAA is intended to illuminate the activities of government – this data only pertains to personal information of voters. This policy reason still holds today. Releasing this data would raise issues of voter fraud and identity theft. A bill that would narrow this exception is heading to the Veterans and Legal Affairs Committee for the upcoming legislative session.

Ref# 49: 22 M.R.S. §2425, Sub-§8, relating to medical marijuana registry identification cards

The Subcommittee voted 3-0 to recommend no modification.

Ref# 52: 22 M.R.S. §4087-A, Sub-§6, relating to information held by or records or case-specific reports maintained by the Child Welfare Ombudsman

The Subcommittee voted 3-0 to recommend no modification.

Ref# 55: 29-A M.R.S. §1301, Sub-§6-A, relating to the social security number of an applicant for a driver's license or non-driver identification card

The Subcommittee voted 3-0 to recommend no modification. The agency survey response indicated concern about a conflict with this exception to the public records covered under FOAA with a provision of Maine's motor vehicle laws that permits disclosure of Social Security Numbers pursuant to the federal Driver Privacy Protection Act, 18 U.S.C. §2721(a)(2). The group discussed this concern and concluded there was no conflict, because the public records exception allows, but does not require, nondisclosure of the SSNs (i.e., they are not designated as "confidential").

Ref# 63: 30-A M.R.S. §4706, Sub-§1, relating to municipal housing authorities

The Subcommittee voted 3-0 to recommend no modification

Ref# 68: 35-A M.R.S. §122, Sub-§1-B, ¶G, relating to information, as it pertains to the sale, lease or use of state-owned land or assets under the provisions of this subsection or activities in preparation for such sale, lease or use in the context of energy infrastructure corridors

The Subcommittee voted 3-0 to recommend no modification

Ref# 69: 35-A M.R.S. §10106, relating to records of the Efficiency Maine Trust and its board

The Subcommittee voted 3-0 to table this item. The Subcommittee received comments from Efficiency Maine Trust that the word “and” at the end of subsection 1, paragraph 3 of this section should instead be an “or.” The Subcommittee was reluctant to make a change without seeing the proposed amendment in formally.

Ref# 70: 36 M.R.S. §6271, Sub-§2, relating to an application, information submitted in support of an application and files and communications in relation to a municipal property tax deferral program for senior citizens

The Subcommittee voted 3-0 to recommend no modification

Ref# 71: 38 M.R.S. §1310-B, Sub-§2, relating to hazardous waste information, information on mercury-added products and electronic devices and mercury reduction plans

The Subcommittee voted 3-0 to recommend no modification

Ref# 72: 38 M.R.S. §580-B, Sub-§11, relating to records held by the Department of Environmental Protection or its agents regarding individual auctions administered under the carbon dioxide cap-and-trade program

The Subcommittee voted 3-0 to recommend no modification

**Exceptions reviewed by the Subcommittee in 2016:** During 2016, the Public Records Exception Subcommittee held three meetings. The Subcommittee’s recommendation on each exception is summarized below.

Ref# 1: 1 M.R.S. §402, Sub-§2, ¶G, relating to committee meetings pertaining to interscholastic sports

The Subcommittee voted 4-0 to indefinitely postpone this item. The Maine Principals Association responded to the request for information that it is not a public body; the exception also pertains to meetings, not public records. The Subcommittee interpreted the public records exceptions review requirement in the Freedom of Access Act to require only a review of

exceptions to the definition of “public records.” The Subcommittee discussed the possibility of further deliberation on this point with the full Advisory Committee.

Ref# 2: 1 M.R.S. §402, Sub-§3, ¶C-1, relating to communications between a constituent and an elected official

The Subcommittee spent considerable time discussing this exception. Several members expressed support for continuation of the exception with no modifications as it is narrowly tailored to protect private constituent information.

Mr. Parr noted that this is another example of information being designated confidential as opposed to the entire record that contains that information being designated confidential, and that this creates a burden on the agencies and public bodies because of increased time required for searching for and redacting the confidential information. He expressed that this was his general problem with these types of public records exceptions and his being in favor of a broader “records” standard for this confidentiality provision.

After some further discussion in the Subcommittee, Mr. Parr made a motion, seconded by Mr. Stout, that the Subcommittee recommend that this public records exception be amended to apply more broadly to the entire record of constituent communication if it contains any of the types of information listed in the current exception. However, the amendment would also require the agency to provide the record with such information redacted, if it did not constitute an undue burden on the agency. The vote was unanimous of those present. This proposed amendment will be put on the agenda for the next full Advisory Committee meeting.

Sen. Burns stated that it was time for the Legislature to have a better disclaimer to make it clearer to the public that constituent communications with legislators may become public record.

Mr. Stout made another motion, proposing that the subcommittee recommend creating a new public records exception along similar lines to the proposed amendment. The new public records exception would exempt from the definition of “public records” any records containing the information described in 1 M.R.S. §402(3)(C-1)(1) and (2) (e.g., an individual’s medical information, credit or financial information, etc.). Sen. Burns expressed discomfort with applying such a broadly applicable public records exception, and wondered about the unintended consequences of such a change. Rep. Monaghan shared this concern, but stated her support for the motion for the purpose of having a discussion of the proposal in the full Advisory Committee. The vote in favor of the motion was 5-1. This discussion will be put on the agenda for the next full Advisory Committee meeting.

Ref# 6: 1 M.R.S. §402, Sub-§3, ¶Q, relating to security plans, staffing plans, security procedures, architectural drawings or risk assessments prepared for emergency events for Department of Corrections or county jail

The Subcommittee voted 6-0 to recommend no modification to the current exception.

Ref# 13: 5 M.R.S. §1541, Sub-§10-B, relating to internal audit working papers of the State Controller

The Subcommittee voted 6-0 to table this item in order to give staff an opportunity to contact The Office of the State Controller again, requesting feedback from the agency regarding this exception.

Ref# 35: 12 M.R.S. §8005, Sub-§1, relating to Social Security numbers, addresses, telephone numbers, electronic mail addresses of forest landowners owning less than 1,000 acres

This item was previously tabled in order for staff to solicit stakeholder input. The one stakeholder group that responded stated that it had no problem with the current exception. The Subcommittee voted 6-0 to recommend no modification to the current exception.

Ref# 36: 12 M.R.S. §8005, Sub-§2, relating to Social Security numbers, forest management plans and supporting documents of activities for administering landowner assistance programs

This item was previously tabled in order for staff to solicit stakeholder input. The one stakeholder group that responded stated that it had no problem with the current exception. The Subcommittee voted 6-0 to recommend no modification to the current exception.

Ref# 37: 12 M.R.S. §8005, Sub-§4, relating to forest management information designated confidential by agency furnishing the information

This item was previously tabled in order for staff to solicit input from the stakeholders identified in the Department of Agriculture, Conservation and Forestry's survey response. No recommended changes were received from stakeholders and the agency itself had recommended no changes in its original response.

Mr. Parr objected to this provision on the basis that it was another example of information being designated confidential as opposed to the entire record itself being confidential, creating a burden on the agency or public body to search for and redact such information.

Ms. Lynch made a motion to recommend no modification to the current exception, reasoning that this exception was involving proprietary and competitive information and that the agency had recommended its continuation. The Subcommittee voted 5-0, with one abstention, to recommend no modification to the current exception.

Ref# 38: 12 M.R.S. §10110, relating to a person's e-mail address submitted as part of the application process for a hunting or fishing license

This item was previously tabled in order for staff to gather additional information from the Department of Inland Fisheries and Wildlife regarding how a member of the public signified their wish for the department to keep the individual's email address confidential, whether this was treated as an opt-in or opt-out type of system.

The department provided draft legislation expanding the exception to individual's applying for permits and registrations as well, and designating this information as confidential. Under the proposal, the commissioner would be permitted to allow a member of the public to clearly indicate that the individual's email address not be kept confidential (an opt-in system). The proposal included additional exceptions to the confidentiality to allow the department to disclose these email addresses to a contractor or state agency for marketing or wildlife management purposes.

Mr. Stout explained the origin of the current public records exception, being aware of the agency responding to a FOAA request for all email addresses contained in the department's electronic licensing system for commercial purposes. He noted that the term "contractor" in the proposed exception to the confidentiality requirement should be clarified.

Mr. Parr made a motion, seconded by Sen. Burns, to 1) recommend no modification to the current public records exception and 2) ask the full Advisory Committee to review the department's proposed legislation for possible action. Ms. Lynch expressed her lack of support for the second part of the motion, noting that the proposed legislation would be more appropriately vetted through the Legislature's Inland Fisheries and Wildlife Committee. Sen. Burns agreed and the motion was withdrawn.

Mr. Parr expressed his support for the draft legislation's opt-in approach and broader application, but echoed concerns about allowing the use of this information by contractors. Rep. Monaghan expressed some concern about the patchwork of public records exceptions regarding this type of personal information.

Mr. Parr made a motion, seconded by Ms. Lynch, to recommend no modification to the current public records exception. The motion was amended at the suggestion of Mr. Stout, to send a letter to the Department of Inland Fisheries and Wildlife to relay the Subcommittee's concerns regarding the draft legislation's allowing the department to use otherwise confidential email addresses for marketing purposes without permission. The Subcommittee voted in favor of the motion, 6-0.

Ref# 39: 12 M.R.S. §12551-A, Sub-§10, relating to smelt dealers reports, including name, location, gear and catch

This item was previously tabled. Staff reviewed the agency response, recommending no changes to current law. Ms. Lynch moved to recommend no modification, noting that this exception goes to the competitive nature of the fishery.

The Subcommittee voted 5-0 to recommend no modification to the current exception.

Ref# 40: 14 M.R.S. §6321-A, Sub-§4, relating to the financial information disclosed in the course of mediation under the foreclosure mediation program

Ms. Lynch spoke to the importance of this confidentiality provision to the process of foreclosure mediation, with much of this information being personal financial information.

The Subcommittee voted 5-0 to recommend no modification to the current exception.

Ref# 41: 17-A M.R.S. §1176, Sub-§1, relating to information that pertains to current address or location of crime victims

Mr. Parr made a motion, seconded by Mr. Stout, to recommend no modification to the current exception. The motion carried, 5-0.

Ref# 42: 17-A M.R.S. §1176, Sub-§5, relating to request by crime victim for notice of release of defendant

Mr. Parr made a motion, seconded by Ms. Lynch, to recommend no modification to the current exception. The motion carried, 5-0.

Ref# 50: 22 M.R.S. §1711-C, Sub-§20, ¶N, relating to hospital records concerning an individual's health care information

The Subcommittee spent considerable time at voted 4-0 to recommend repealing this exception, provided the statute was explicitly clear that all other federal laws concerning confidentiality and privacy applied. HealthInfoNet, the custodian of the records subject to this exception, responded to the request for information that it is not a public body subject to FOAA. Staff reviewed case law regarding how to determine if a body is a public body subject to FOAA; the Subcommittee determined that HealthInfoNet is not a public body. Because the exception is inoperative, the Subcommittee recommended its repeal.

Ref# 51: 22 M.R.S. §2153-A, relating to information provided to the Department of Health and Human Services by the U.S. Department of Agriculture and the U.S. Food and Drug Administration that is confidential under federal law

Staff related the Department of Health and Human Services (DHHS) survey response, where the agency had responded that the Department of Agriculture, Conservation and Forestry (ACF) was the custodian of these records because 22 M.R.S. §2153 gives that department the power to promulgate appropriate regulations. ACF provided no response to staff questions.

Mr. Parr noted that this was an example of a specific public records exception for information that is already made confidential under another statute, in this case a federal statute. Ms. Lynch made a motion to recommend no modification to the current exception, but the motion failed. Mr. Parr asked staff to attempt to gather more information from the agencies to determine where the records actually are.

The Subcommittee voted 5-0 to table this item until the next meeting.

*[additional discussion from September 14<sup>th</sup> Subcommittee to be added]*

## V. COMMITTEE PROCESS

This year, the Right to Know Advisory Committee held five committee meetings, which are summarized below.

### Summary of June 22, 2016 meeting

#### Summary of the Right To Know Advisory Committee duties and powers

Staff reviewed the Advisory Committee's duties as set forth in Maine's Freedom of Access Act (FOAA) at 1 MRSA §411, sub-§6.

#### Summary of actions of the 127th Legislature, Second Regular Session, affecting FOAA/RTKAC recommendations

Staff reviewed the legislative outcome of the recommendations included in the Advisory Committee's January 2016 report. The 2016 report included proposed legislation regarding remote participation by members of public bodies, in response to Advisory Committee's recommendation, the Judiciary Committee created LD 1586, "An Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Remote Participation in Public Proceedings." A majority of the Judiciary Committee voted "Ought Not to Pass" on LD 1586, however a minority of the Judiciary Committee proposed an amendment that would have required a governmental entity to adopt a written policy governing remote participation by members that also describes how the policy meets the principles of FOAA. The bill and the amendment were not enacted.

The Judiciary Committee considered another remote participation bill, LD 1241, "An Act To Increase Government Efficiency," which was carried over from the First Regular Session to the Second Regular Session. As finally enacted, LD 1241 permits the board or commission of each of four State bonding authorities (the Maine Governmental Facilities Authority, the Maine Health and Higher Educational Facilities Authority, the Maine State Housing Authority and the Maine Municipal Bond Bank) to conduct public proceedings with members participating via remote access technology in certain circumstances (i.e., the member is needed for a quorum, illness of the member, weather that makes driving hazardous, or unexpected traffic delays or vehicle breakdowns when the commissioner is traveling to the meeting). LD 1241 was finally enacted as Public Law 2016, chapter 449.

Mr. Parr asked what should be inferred from this legislation regarding what authority is needed in law before a body may allow remote participation by its members at public proceedings. Staff noted that there still seem to be two approaches clarifying remote participation in public meetings: 1) specifying broad authority for remote participation in FOAA itself, and 2) providing specific authority for a governmental entity in its statutes. Staff also noted the Governor's position that remote participation is already permitted under FOAA as long as all FOAA requirements are otherwise met, as stated in the veto message to LD 1809, "An Act Concerning

Meetings of Boards of Trustees and Governing Bodies of Quasi-municipal Corporations and Districts That Provide Water, Sewer and Sanitary Services”; that veto was not overridden by the 126th Legislature.

Ms. Goucher stated that she would like to see the Advisory Committee attempt another recommendation in this area, because the issue is not going away until there is some guidance and clarity given. The Advisory Committee did not take a formal action on this request.

Summary of actions of the 127th Legislature, Second Regular Session, affecting FOAA: Proposed public records exceptions reviewed by Judiciary Committee

Staff summarized several bills containing proposed public records exceptions referred from policy committees to the Judiciary Committee for review in the Second Regular Session: LD 466, “An Act To Increase Competition and Ensure a Robust Information and Telecommunications Market,” which was referred by the Energy, Utilities and Technology Committee; LD 1467, “An Act Regarding Maine Spirits,” which was referred by the Veterans and Legal Affairs Committee; LD 1498, “An Act To Clarify Medicaid Managed Care Ombudsman Services,” which was referred by the Health and Human Services Committee; LD 1499, “An Act To Increase the Safety of Social Workers”; LD 1578, “An Act To Update Maine's Solid Waste Management Laws,” which was referred by the Environment and Natural Resources Committee;

Review of public records exceptions enacted from 2005- 2012 pursuant to 1 MRSA §433

Staff reviewed the status of the Advisory Committee’s review of existing public records exceptions, which the Advisory Committee began last year and is due by 2017. The Public Records Exceptions Review Subcommittee reviewed a number of exceptions after the Advisory Committee’s last meeting in 2015 that will be presented for final action by the full committee in 2016. Next year, the Advisory Committee will begin reviewing all existing public records exceptions found in Titles 1 through 7-A. That review will be due by 2019.

Staff provided an update on a potential issue identified in 2015 involving the Department of Education’s ability to share teacher disciplinary information with other states because of the breadth of confidentiality provided at 20-A MRSA §13004, sub-§2-A. In 2015 the Subcommittee recommended to the full Advisory Committee that it draft legislation, with direction from the Department of Education, to address the issue. The Advisory Committee decided not to recommend a change to the statute, and instead notified the Education and Cultural Affairs Committee about this issue and the issue of teacher discipline confidentiality more generally. The Education and Cultural Affairs Committee determined that the Department does not seek to share confidential disciplinary information with other states. It seems this issue is resolved for both the Right to Know Advisory Committee and the Education Committee.

Potential topics and projects for 2016

- Confidentiality of hazardous material transfer by railroads

Staff related a request from the Judiciary Committee for the Advisory Committee to include in its public records exceptions review a provision enacted by LD 484 in 2015 and now codified at 1 MRSA §402(3)(U), which makes information held by the Department of Environmental Protection relating to the transfer of hazardous material by railroads confidential. Mr. Pringle moved for the Advisory Committee to take action on this item. The vote was unanimous of those present that the full Advisory Committee discuss the issue.

- *Confidentiality of personal contact information for professions and occupations regulated by the State*

Staff related a request from the Judiciary Committee for the Advisory Committee to develop comprehensive recommendations for the treatment of personal contact information for professions and occupations regulated by the State. In the Second Regular Session of the 127th Legislature, LD 1499 enacted a new confidentiality provision for social worker licensees' and license applicants' addresses and telephone numbers; in connection, the Judiciary Committee sought a uniform policy for all licensing information. Staff noted that some licensing boards do make certain licensee information confidential in statute already. The Advisory Committee discussed how a uniform policy would need to balance the safety interests of the public in having access to licensee information with the privacy interests of licensees and license applicants.

After conversation on the topic, Mr. Parr moved for the full Advisory Committee to take up this topic in its business this year. All present were in agreement except for Mr. Higgins and Ms. Goucher. Mr. Higgins stated that his reluctance was due to concern with how far this would go toward confidentiality, and concern with expanding confidentiality even when licensees are not requesting it. Ms. Goucher stated that her opposition to the vote was because we already have a uniform policy – that these records are public – and any deviation from that requires a group to come before the Legislature to make its case and seek an exception. Mr. Higgins noted that it seemed we are trying to turn current policy on its head. Sen. Burns stated that it would be good for the Judiciary Committee to have guidelines to help in its considerations of future confidentiality proposals in the licensing area. Rep. Monaghan agreed it is important to have a uniform policy as new requests for confidentiality are inevitable. Ms. Pistner stated there were obviously some competing concerns, but expressed that she thought a compromise could be reached (for example, if a personal phone number is to be confidential, the licensee would have to provide a work number that would be open to the public).

Sen. Burns reiterated that the Judiciary Committee was not looking to change policy, but wanted to establish factors to consider when making decisions about new confidential licensing provisions. He requested staff provide some written material before the next meeting regarding this licensee confidentiality topic.

- *FOIA assistance for indigent members of the public*

The Advisory Committee next considered the request of Ken Capron for the development of a mechanism to help provide funds for indigent complainants to bring forward FOIA cases and the possibility of developing a standard court form to help pro se indigent complainants. The Advisory Committee took no action on this topic.

- *FOAA agency time and cost estimates, fee waiver policies and remedies for requesters*

Jack Comart of Maine Equal Justice Partners emailed the group in April with 5 suggestions: 1) require agencies to provide an estimate of time and cost for each separate component of a request for information; 2) require agencies to publically post and make available their fee waiver policy; 3) require that agencies grant fee waiver requests based upon reasonable standards; 4) clarify when estimates of time and cost must be provided by the agency; and 5) provide some recourse for requesters of information for agency action that may be arbitrary or capricious.

Staff reviewed current agency FOAA response time requirements, and also noted that while FOAA allows an agency to waive fees under FOAA, there is no requirement that the agency have a fee waiver policy or publically post such policy. The Advisory Committee took no action on this topic.

*Discussion of any additional topics and projects for 2016*

Sen. Burns gave the group notice that there would be an agenda item relating to a potential issue involving executive sessions for the Committee's consideration at the next meeting. The discussion was opened up to the group regarding any other items of concern for potential consideration this year.

- *Criminal History Record Information Act (CHRIA) and the Judicial Branch*

Ms. Meyer raised a possible topic for future Advisory Committee discussion regarding the Judicial Branch's recent reversal of an October decision to make case files for dismissed cases confidential within 30 days of judgement. The prior policy had been based on an interpretation of the Criminal History Record Information Act (CHRIA) and an administrative order, which the media challenged. There may be a need to clarify some statutory ambiguity. Ms. Meyer suggested that this discussion should not happen without Ms. Lynch from the Court System being present. Sen. Burns moved to include this item in the next agenda and it was agreed by unanimous consent.

- *Social Security Numbers in medical files held by the Dept. of Health and Human Services*

Ms. Morgan asked if former Rep. Bradley Moulton could address the group about a concern he had based on his dealings with the Department of Health and Human Services in his capacity as a private attorney; Sen. Burns welcomed Rep. Moulton to the microphone.

Rep. Moulton explained that those who bring complaints before the medical boards make their records public information. His client had to file FOAA requests with the Department of Health and Human Services to access her medical review records. His and his client's chief concern was that these records included his client's social security number, and that this sensitive information was being treated as a public record. The Advisory Committee took no action on this topic.

- *Warden's Service FOAA requests*

Rep. Monaghan asked to discuss the issue of the Warden's Service FOAA requests about which the Advisory Committee had been asked to hold a public meeting. Sen. Burns gave the Advisory Committee an update, stating that he, Rep. Monaghan, the Presiding Officers of the Legislature and a representative of the Attorney General's Office were to have a meeting later that day to discuss the best way to proceed. Mr. Higgins moved to include an agenda item for the next meeting to discuss the outcome of this meeting; it was agreed by unanimous consent.

### Discussion of Subcommittees

The Advisory Committee agreed that there would be one Subcommittee--Public Records Exceptions Review Subcommittee. Sen. Burns, Rep. Monaghan, Ms. Pistner, Ms. Lynch will continue to serve as members with the addition of Mr. Stout and Mr. Parr this year.

### Summary of July 20, 2016 meeting

#### Hazardous material transported by railroads

Staff reviewed the request from the Legislature's Judiciary Committee to examine the public records exception to Maine's Freedom of Access Act (FOAA) recently enacted in LD 484 (Public Law 2015, chapter 161), relating to hazardous material transported by railroads. Staff reviewed the packet of documents provided to the Advisory Committee, including the statutory criteria for review of public records exceptions and information supplied by the Department of Environmental Protection regarding this public records exception in response to a survey questionnaire sent by staff.

Mr. Parr noted that the intent of the exception seems aimed at preventing acts of terrorism, but that there are already a number of other FOAA exceptions for sensitive information related to potential terrorist attacks. For example, 1 MRSA §402(3)(L) is an exception for records describing security plans, security procedures or risk assessments prepared specifically for the purpose of preventing or preparing for acts of terrorism, and Title 16 would seem to provide alternate means of protecting this kind of information as well. Mr. Parr asked staff if these exceptions were taken into account in the Judiciary Committee's deliberations on this exception. Staff replied that the Committee was aware of the existing security plan exception. This new exception may go beyond that. Railroad companies were concerned that this preexisting security plan exception was not adequate to protect the records they were concerned with. It was noted that the Judiciary Committee never received any testimony on the bill with concerns about these records not being public.

Rep. Monaghan, who is also a member of the Judiciary Committee, did not recall if a side-by-side comparison of similar state laws had been provided during the Judiciary Committee's consideration of the bill. Staff replied that the only comparable state law provided to that committee was a Massachusetts law that was broad enough to cover hazardous material shipped by rail; this law is not specific to railroads, unlike the Maine law.

The Advisory Committee discussed whether the Judiciary Committee had reviewed the bill against the criteria in 1 MRSA §432(2) as the Judiciary Committee typically does, and whether there has been any change in circumstances relative to the criteria for this exception since that Committee's original review. Although members of the Judiciary Committee believed they had reviewed the proposed exception in light of the statutory criteria, the review had not been documented with a review checklist. Staff and Advisory Committee members noted that there does not appear to have been any changes in circumstances, for example in federal law, since the bill was passed, except for increased public interest likely generated by media reports.

Mr. Pringle noted that the current language of the exception is broad and causes the Department of Environmental Protection (DEP) to wonder to what extent the exception applies to their records. He also remarked that it seemed odd that Maine citizens should know nothing about hazardous material transported across the state and expressed concern with the sheer number of materials covered by this broad exception – the “hazardous material” definition comprises approximately 200 pages in federal regulations – and suggested that at least some of these materials probably don't need to be kept confidential.

The Advisory Committee discussed the issue of the broad “hazardous material” definition, and the best way to determine how to narrow it, if at all. There was doubt expressed about whether this may be an issue any more, since the DEP has recently resumed releasing summaries of rail shipments of crude oil, albeit after the date of shipment.

Ms. Pistner noted that there are several issues involved with this topic: how to address the public concern that has arisen since the bill's enactment; whether the problem is fixed now that the DEP is providing a summary list of railroad crude oil shipments; whether the scope of hazardous materials should be narrowed in the exception; and finally, if the summary DEP is currently releasing should be required by statute.

In response to the Advisory Committee's discussion, staff noted that related issues that may need to be resolved are whether the public have access to this information, whether there is a need to make more information public than DEP is currently releasing in its post-shipment summaries, and whether DEP has concerns with the current statutory language.

Mr. Parr introduced the idea of sending a letter to the Judiciary Committee recommending that it revisit this topic, potentially narrowing the scope of the exception and providing the public another opportunity to comment on the provision. Sen. Burns added that the letter should request that the Committee create a committee bill as a vehicle for this reconsideration.

Peggy Reinsch, nonpartisan staff for the Judiciary Committee and former staff for the Advisory Committee, addressed the committee at the chair's invitation. She offered that it would be helpful for the Judiciary Committee if the Advisory Committee's letter outlined exactly what the questions or issues are.

The Advisory Committee decided to go through the checklist of public records exception review criteria (1 MRSA §432(2)) to better focus its request to the Judiciary Committee. The group highlighted the areas of greatest concern, including: paragraph G – whether public disclosure

jeopardizes the public and if so, whether that safety interest substantially outweighs the public interest in the disclosure of the records; paragraph H – whether the proposed exception is as narrowly tailored as possible; and paragraph E – whether the public disclosure puts a business at a competitive disadvantage and, if so, whether that interest substantially outweighs the public interest in the disclosure of records.

Advisory Committee members also voiced concern about whether the information should only be made available retrospectively, or whether the public should have a right to the information prospectively.

On Mr. Parr's motion, and Ms. Goucher's second, the group unanimously approved sending a letter to the Judiciary Committee on this issue. Staff agreed to draft the letter, outlining the issues raised by the Advisory Committee, for review at the next meeting.

*Personal contact information for professions and occupations licensed by the State*

Staff reviewed the background documents provided to the Advisory Committee, including the recently enacted bill providing a public records exception for the addresses and telephone numbers of licensees and license applicants in the possession of the State Board of Social Worker Licensure. Staff also reviewed a list of occupations and professions licensed in Maine. Staff informed the group that in terms of licensing information, generally the protected information is an individual's Social Security Number, unless a specific law is enacted to protect particular information for a particular licensing category.

Mr. Pringle mentioned the example of nurses, physicians and osteopaths, where there is a separation of personal private information on licensees from the public information, and wondered how well this has worked in practice. Staff replied they would need to reach out for further information, but shared a letter submitted by Planned Parenthood to the Advisory Committee stating that information about licensees that is supposed to be private was released to the public in response to at least one FOAA request.

The Chair invited Nicole Clegg, Vice President of Public Policy for Planned Parenthood of Northern New England, to comment. Ms. Clegg related her organization's experience with FOAA requests to the State Board of Nursing. Ms. Clegg stated that although the Board's redaction of non-public, personal information has gotten better, there is still a significant amount of information released, including photographs of licensed nurses, in response to anonymous email requests for public records. The release of this information in this manner is distressing to employees of Planned Parenthood.

Mr. Parr noted that the Advisory Committee has previously discussed whether anonymous FOAA requests should be permitted. He noted that the purpose of FOAA is to provide the public information about what the government does. He asked Ms. Clegg whether she saw any value in sharing this amount of information to the public under FOAA. Ms. Clegg replied that she struggled to find a reason that the public should have a right to know this amount of information about a private citizen.

Ms. Pistner noted the tension between the safety and privacy of licensees with the public need to know who is actually licensed, and asked Ms. Clegg to clarify the scope of her request for increased privacy. Ms. Clegg acknowledged the public interest, but iterated that she didn't see the need for the public to have access to the entire license application file – the wealth of information available to the public is significant, even if the applicant's address is redacted.

Ms. Meyer mentioned recent legislation limiting the scope of the Maine Human Rights Commission's investigation records that would be subject to FOAA requests, noting that the compromise struck by this exception could be a useful model. Sen. Burns noted it would be helpful to have more information on this, to inform the group's efforts in finding the balance between public and private information.

Mr. LaHaye questioned the propriety of anonymous FOAA requests. Mr. Parr weighed in, noting his belief that when citizens are required to provide private personal information to government, the government has a duty to safeguard that information, except when release of the information furthers the underlying purpose of FOAA. Mr. Parr offered that an opt-in or opt-out system might be one model to look at in trying to strike the appropriate balance.

Mr. Stout shared his familiarity with the federal Privacy Act, which acts to counterbalance the federal Freedom of Information Act. Under the federal system, personally identifiable information (PII) is only permitted to be collected and used for certain purposes, and is not permitted to be publicly disclosed.

Ms. Clegg of Planned Parenthood noted that the Maine Gambling Control Board protections for PII are a good example. Mr. Pringle suggested using as a template the exceptions we already have, for example the protections around public employee personal information, and looking at what information the public really should know about a person licensed by the State.

Anne Head, Commissioner of the Department of Professional and Financial Regulation, was invited to address the group. Commissioner Head acknowledged that the Advisory Committee was faced with an interesting and tough decision involving personal privacy interests and public oversight of agency actions. She reminded the Advisory Committee that licensees put their information on record with agencies in order to receive permission from the State to do certain things. However, she also recognized that while there is a need for public oversight over government decision making, there may be legitimate personal safety and privacy interests that can be served through some middle ground. She then encouraged the Committee to consider what they are trying to achieve with this potential change. Mr. Parr asked if the group could focus its work on protecting certain classes of personal information. Comm. Head answered in the affirmative and noted that there may be more information collected by boards and agencies than is necessary for licensing purposes: agencies have a responsibility not to over-collect.

Staff agreed to put together templates of examples of personal information that is currently protected.

Ms. Pistner noted that the public needs access to licensing information to make sure the Board acting appropriately. For example, access to this information allows the public to know the basis

for the grant or denial of a license application. However, access to this information can also be abused, she noted.

Sen. Burns remarked that this was a balancing act, but the bottom line should be protecting people's safety. Just because one seeks a professional license does not mean the person needs to put his or her life in danger. He also voiced support for developing a uniform policy for the treatment of licensing information.

Mr. Parr made a motion, seconded by Mr. LaHaye, that the group look at existing examples of policies and law that focus on personal contact information to develop a uniform policy regarding personal information in licensing records.

Rep. Monaghan stated that before individuals provide their information for licensure, there should be a disclosure from the agency as to what portion of that information will be public and what will be kept private.

Ms. Meyer noted that the Planned Parenthood letter was disturbing, but the flip side is that making PII available to the public can protect the public in ways that are more beneficial than protecting a particular licensee. For example, having access to a plumber's home address can allow members of the public to determine if he or she is a registered sex offender. Mr. Shorey stated his view that too much licensing information is publicly available, that the availability of that information can cause harm, and that it is time the group tried to do something to protect some of that information, even if the proposed solution isn't right the first time. Ms. Goucher opined that with modern technology, and Google searches, the public already has access to an incredible amount of personal information – keeping government records confidential is only putting a finger in the dike. Sen. Burns agreed that private information was readily available with modern technology, but stated that people place a lot of trust in government and expect a certain level of prudence and accountability.

The group agreed to place this item on the next meeting agenda. The Committee asked Planned Parenthood to reach out to its national organization for additional policy guidance. Advisory Committee staff agreed to search for examples from other states of protections for personal information in licensing records. The committee voted unanimously in favor of this course of action.

Maine Warden Service FOIA requests; Advisory Committee request to Colin Woodard and Sigmund Schutz for input and suggestions for changes in policy or law

Staff reviewed correspondence provided to the Advisory Committee regarding the ongoing dispute between the Portland Press Herald/Maine Sunday Telegram and the Maine Warden Service over the agency's response to the paper's FOIA requests. This included a letter dated June 24<sup>th</sup> from Sen. Burns and Rep. Monaghan to Colin Woodard of the Portland Press Herald and the paper's attorney, Sigmund Schutz. The letter stated that despite recent requests for a public hearing regarding the issues between the paper and the agency, the Advisory Committee was not a fact-finder or arbitrator of disputes and was better suited to discussing and considering policy solutions to problems concerning access to public records. Accordingly, the letter invited

input or suggestions for changes in policy or law based on the paper's recent experiences with the Maine Warden Service.

The Advisory Committee was copied on a July 1<sup>st</sup> letter from Mr. Schutz to the Warden Service and the Attorney General's Office summarizing the paper's dissatisfaction with the agency response as being untimely and incomplete, as well as conditioned on an unreasonable fee.

The Warden Service responded to Mr. Schutz's letter on July 15, and copied Advisory Committee staff. This letter disputes the characterization of the agency's response.

On July 18<sup>th</sup>, Mr. Schutz responded to the Sen. Burns and Rep. Monaghan request letter on behalf of the paper, declining to offer suggestions for changes in the law because the paper does not engage in legislative advocacy. The letter noted that if the Advisory Committee focuses only on changes in the law, it may overlook related issues of compliance with and enforcement of current law.

Sen. Burns recapped the meeting that he, Rep. Monaghan, the Presiding Officers of the Legislature and the Office of the Attorney General had after the last Advisory Committee's meeting, at which it was decided that Sen Burns and Rep. Monaghan would send the June 24<sup>th</sup> letter.

Rep. Monaghan suggested that the Advisory Committee should have a discussion about State agencies' compliance with FOAA to prevent similar disputes from arising again. Sen. Burns disagreed, noting that the law enables aggrieved parties to use the Superior Court to force compliance. Ms. Pistner pointed to the "10 Factors for Estimating Time" document Eric Stout had put together as a helpful development for understanding agencies' response time. Also, she pointed to upcoming training for agencies presented by Brenda Kielty, the Public Access Ombudsman.

Ms. Kielty was invited to address the group. She discussed an upcoming training she is providing for all Executive Branch agency public access officers. This will be the first time all agency public access officers will receive training at the same time. The format will be a round table discussion, focused on two topics: 1) providing a cost estimate for FOAA responses, and 2) conducting searches. Regarding the cost estimate, she noted that it is not an easy determination. She worked with Mr. Stout to develop standards to apply to the estimate process, and finds the rubric developed by Mr. Stout as a helpful way for agencies to approach the estimate process. Regarding the search topic, Ms. Kielty noted that FOAA doesn't tell an agency how to search for documents and there is currently no common methodology for searching electronic records, specifically emails. After the training, Ms. Kielty plans to continue dialogue with the public access officers. Ms. Kielty agreed to attend the next meeting and present a preliminary Public Access Ombudsman report as well as an update after the public access officer training.

Ms. Meyer raised the idea of the Advisory Committee having a public hearing, not to delve into the specifics of any dispute, but to look at the bigger picture of how FOAA is working for the public. She noted that the Advisory Committee has been around for 10 years and has not held a public hearing yet. The Advisory Committee discussed this notion of a public hearing, and how

it might work. Members raised questions about what the Advisory Committee would seek to do with the information gained from the public hearing, how the meeting would be run in order to elicit the most useful testimony and concerns that the viewpoint of agencies may not be fairly represented. Ms. Kielty weighed in that the idea of the public providing input on FOAA in the larger sense is very timely. FOAA is a dynamic statute and this would be a valuable opportunity to hear how it is working. Ms. Kielty also offered the idea of a summit format, where specific parties would be invited to provide input to help the focus be more clearly on ways to improve the law and less on the details of individual cases. The Advisory Committee favored providing broader public input.

Sen. Burns offered that before the next meeting the chairs would seek input from the Attorney General's Office and the Director of the Office of Program Evaluation and Government Accountability, Beth Ashcroft, for additional ideas about organizing the public hearing. Discussion on a potential public hearing will be added to the next meeting's agenda. This discussion will be held after the feedback from Ms. Kielty on the results and agency perspectives from her public access officer training.

Review subcommittee recommendations relating to existing public records exceptions enacted from 2005- 2012, pursuant to 1 MRSA §433

Staff presented the recommendations of the Public Records Exceptions Review Subcommittee from its December 2015 meeting. The Advisory Committee tentatively agreed to support the recommendations of the Subcommittee, but reserved the opportunity to raise any questions or concerns at the next meeting.

Potential topic for future discussion: Consider legislation requiring local boards and committees to record their executive sessions and to preserve these records so that they may be legally discoverable if there is a later dispute about either the content or propriety of the discussion held during these sessions

Mr. Pringle expressed doubt about taking up this topic given the amount of business already before the Advisory Committee and because this is an issue that largely arises in the municipal context but there is no municipal interest representative yet appointed to the Advisory Committee to provide that municipal perspective. The municipal interest member should be seated before the Advisory Committee takes up this issue. Mr. Pringle suggested checking on the status of this appointment.

Ms. Pistner pointed out that besides checking on the status of the municipal member of the Advisory Committee, the group should be sure to give adequate public notice to municipal interests so that they may attend and provide feedback.

The Advisory Committee decided that this topic would be tabled until the next meeting, at which staff will present information on the statutory requirements around meeting minutes and executive sessions. Sen. Burns will formally encourage the appointment of the municipal member of the Advisory Committee.

Review of 10 factors for estimating time to respond to a request under the Freedom of Access Act suggested by Eric Stout

Mr. Stout gave a brief presentation to the group on his document, "Freedom of Access Act (FOAA) Email Searches: 10 Factors for Estimating Time."

Mr. Stout began with a FOAA request metaphor: When one goes to the mechanic to get an estimate for repairs to a broken automobile, it is difficult for the mechanic without first lifting up the hood and taking a look at the engine.

Mr. Stout relayed his experience assisting agencies with searches, noting that requestors usually believe the search is going to be easier and cheaper than it ends up being. He also noted the amount of difficulty for agencies to put together a good faith estimate, owed largely to the agencies not knowing from the beginning what the volume of search results will be. At the current time, it is necessary to search each individual State employee's email account. In the future, the current email system may be replaced with an email system that has an "immutable archive" that can be searched centrally. A computer is fast, but a computer can't tell whether search results returned are really relevant to a FOAA requestor's request – this takes staff time to search through the initially returned records. Mr. Stout emphasized the importance of establishing a relationship of trust between the agency and the requestor and maintaining a conversation between the parties to be sure that the agency is spending its time producing the records the requestor is truly seeking.

Maine Center for Disease Control and Prevention

Although not on the agenda, Ms. Meyer raised an issue about a recent Maine Center for Disease Control and Prevention rulemaking that would create new public records exceptions from FOAA, rendering information about disease outbreaks not public records unless they affected more than 2,000 people. She wondered how this could be accomplished in rulemaking. Staff agreed to look further into the issue for the group.

Anonymous FOAA requests

A topic that briefly arose earlier in the meeting was revisited by Mr. Parr, who inquired whether there was any interest by the Advisory Committee in taking up the topic at its next meeting. This would include a discussion of the extent to which, if at all, an agency can ask for the purpose of a FOAA requestor's request. Staff will provide more information on this topic, and will provide documents by email prior to the group's next meeting.

Summary of August 17, 2016 meeting

Hazardous material transported by railroads

Staff discussed a draft letter from the Advisory Committee to the Legislature's Judiciary Committee, in response to the Judiciary Committee's request for the committee to review the public records exception at 1 MRSA §402, sub-§3, ¶U. The Advisory Committee's letter

recommends that the Judiciary Committee consider submitting a committee bill to the Legislature so that the current exception may be fully vetted by the Legislature in a manner that allows the most meaningful participation from stakeholders and other members of the public, and from state and local government entities. The letter iterates the Advisory Committee's interpretation of the current law, that it is not intended to prevent public access to summary or aggregate information about the transportation of hazardous materials by rail in the State, particularly crude oil, or to prohibit disclosure of information about spills or accidental discharge of hazardous materials.

The Advisory Committee laid out a number of questions and concerns that may help guide the Judiciary Committee's formation of a committee bill, including whether disclosure of the information sufficiently jeopardizes public safety to outweigh the public interest in disclosure, whether disclosure disadvantages a business interest sufficiently to outweigh the public interest in disclosure and whether the language of the current exception is as narrowly tailored as possible.

After the summary, Mr. Pringle made a motion, seconded by Mr. Parr, to send the letter as written to the Judiciary Committee. Mr. Stout pointed out that the federal regulations cited in this public records exception for the definition of "hazardous materials" do not point directly to the 150-plus pages of materials in 49 Code of Federal Regulations § 172.101, which should be clarified. He also wanted mention of the extensive record keeping and retention requirements in Part 172 of the federal regulations. The motion was amended to include Mr. Stout's suggested change and was voted unanimously.

#### *Personal contact information for professions and occupations licensed by the State*

Staff summarized their research into examples of models that could guide the formation of policy recommendations for a more consistent approach to adding protections for the personal information of professional and occupation licensees and license applicants. Research was condensed into a chart distributed to the Advisory Committee, and Staff reviewed this document outlining examples of policy options. The examples drew from various public records exceptions from Maine law, e.g., those protecting the residential address and telephone numbers of emergency medical services, nursing, osteopathic and medicine licensees and applicants when professional contact information has been provided. Examples from other states were also included in the document, including personal information protections for licensees in California, Indiana, Missouri and North Dakota.

Staff provided information on LD 1171 from the 127<sup>th</sup> Legislature. At the last meeting, a member had pointed to the amended version of this bill as providing an example of a reasonable compromise between privacy interests of individuals and the public interest of the public. This bill dealt with the confidentiality of the investigative records of the Maine Human Rights Commission, and the majority amendment of the Judiciary Committee would have designated certain information confidential, including medical records, the identity of a minor, personnel records, personal telephone numbers and home addresses.

The Advisory Committee invited up Nicole Clegg, Vice President of Public Policy for Planned Parenthood of Northern New England. Ms. Clegg, who had been asked by the Committee for more information at its prior meeting, distributed a number of handouts: a memo from Planned Parenthood, a report from the National Abortion Federation on violence and disruption against abortion providers, a statement filed in Superior Court in the State of Washington by the National Director for Affiliate Security at Planned Parenthood Federation of America outlining the history of violence and harassment against abortion providers and abortion-providing facilities, and a copy of Maryland law (MD Code, General Provisions, §4-333) making all licensing records confidential except for certain specified categories of information.

Ms. Clegg reiterated that the only non-public information in Maine licensing records is an individual's Social Security Number. She pointed out that even a licensee's federal Drug Enforcement Administration (DEA) drug authorization card is released pursuant to public records request, creating a security risk in itself. She noted that sometimes home addresses are redacted.

Mr. Pringle expressed his view that it would be better to say what isn't public than to specify what is public. Otherwise, he noted, the Advisory Committee would have to look through entire licensing files deciding what was useful to the public and what should be confidential. He stated his belief that home address, home phone and fax numbers and personal cellphone numbers should be confidential. He opined that 1 MRSA §402(3)(O) should be used as a starting place for designating what should be designated confidential in licensing records. Mr. Parr suggested an opt-in type of system, where certain licensing information would be confidential unless the subject of the records affirmatively allowed public disclosure.

Ms. Pistner voiced concern that increased agency costs to redact new categories of information in licensing records would create a fiscal note, likely dooming any bill seeking this increased confidentiality. To reduce agency time and costs, Ms. Pistner suggested perhaps developing a certain document containing information most valuable to the public that did not include private information, and then making that document a public record while the rest of the licensing files would be confidential. Mr. Parr reminded the Committee that there were other categories of licenses regulated by other departments, including 3 by the Department of Public Safety.

Ms. Clegg from Planned Parenthood asked the Advisory Committee to consider a notification system that would notify licensees if their file was requested by a member of the public.

Ms. Meyer, Rep. Monaghan and other Committee members noted that the Committee should keep in mind that there are many categories of licenses other than those commonly subject to harassment as illustrated by Planned Parenthood, expressing hesitancy at applying the same level of confidentiality to all license categories. Mr. Higgins, Ms. Meyer and Ms. Morgan variously expressed the idea that in general, the more the public knows about licensees the better, except in certain circumstances of concern, and that it was important that the public be able to verify the address of a licensee. Several members voiced support for the earlier idea of a form that would be public that contained certain licensee contact information as a solution to the potential harassment issues facing certain licensees.

Mr. Parr asked staff to review what the original request from the Judiciary Committee was on this topic. Staff replied that the Advisory Committee had been asked to develop guidance to assist the Judiciary Committee when it considered proposed confidentiality provisions for licensing information. Sen. Burns stated that the clearer the guidelines, the better, and that the Advisory Committee should err on the side of transparency.

Ms. Clegg from Planned Parenthood suggested that photographs and DEA authorization cards be kept confidential. She noted that DEA cards contain the licensee's name, address, drugs that can be prescribed, date of card issue, expiration date and DEA number.

Ms. Lynch expressed interest in communicating to other license categories to see if there were other concerns with DEA authorization information being released as public records.

Mr. Parr made a motion, seconded by Mr. Pringle, that the Advisory Committee send a letter to the Judiciary Committee with guidance for considering proposed confidentiality provisions applicable to licensing records. The letter would support the general principle that personal contact information should not be public, similar to the criteria at 1 MRSA §402(3)(O) for protecting public employee personal information, except for cases in which the licensee or license applicant has only provided a personal address and not a public business address. Licensees and license applicants must either be presented with an opt-in approach to personal contact information disclosure, or else the regulating body should have a form that would be public but would exclude non-public private information about the individual.

The Committee voted in favor of the motion, 11-2.

#### Public Access Ombudsman update & recap of Public Access Officer training

Brenda Kielty, Public Access Ombudsman, addressed the Advisory Committee, beginning with a summary of the preliminary report distributed to members. Ms. Kielty noted that the upward trend for number of contacts from the public since 2013 has continued. Of the contacts, most are inquiries about Maine's Freedom of Access Act (FOAA) as opposed to complaints. When she receives suggestions for FOAA improvements, which happens seldom, she said that she refers these suggestions on to the Advisory Committee. Most contacts, she noted, are from private citizens as opposed to government officials.

Ms. Kielty suggested that issues of perceived delay in FOAA response time by public bodies is often due to the expectations of the public requestors not aligning with reality. Executive sessions seem to create the most FOAA inquiries and complaints. Another popular topic is what constitutes a public meeting, especially in the context of remote participation.

Mr. LaHaye asked if Ms. Kielty contacts an agency when a member of the public complains about the agency. She replied that her goal is conflict resolution, and her intervention all depends on the particular case. She may encourage the requestor to work with the agency, as her intervention may sometimes escalate a conflict.

Ms. Kielty next discussed the recent Public Access Officer training she had given. The focus of the training was on the process of searching for records. She noted that this is an area in which FOAA is silent, and that searches for electronic records are much different than searches for paper record. The procedure begins with proper record retention, actually searching the records, assembling the records, reviewing the records and finally providing access to the requestor. Ms. Kielty noted that Advisory Committee member Mr. Stout provided assistance with the email search portion of the training, which will be offered to each State agency as a follow-on to the initial group meeting.

Ms. Meyer asked if this information was also being provided to the Maine Municipal Association and the Maine School Management Association, and Ms. Kielty replied that she does do outreach to those organizations and will continue to do so. The information from the training will need to be customized somewhat to better address the needs of the other public bodies which these organizations represent.

Sen. Burns asked about records retention training, to which Ms. Kielty replied that the Maine State Archives provides such training. She acknowledged that more can be done in the area of records retention, and must be done.

#### Right to Know Advisory Committee public hearing

Staff distributed and reviewed the draft public hearing notice for the potential upcoming Advisory Committee public hearing about how FOAA is working and how it might be improved. Staff pointed out that the notice specifically states that the hearing is not a forum for the resolution of specific complaints about meetings or records.

Mr. Higgins wondered if the Advisory Committee or specific members had received any requests from the public to hold a public hearing. Several members noted that they had. Ms. Lynch noted that government officials are feeling some FOAA requests are burdensome and she expect to hear from these officials who bear the burden of responding to FOAA requests as well as from members of the general public.

Ms. Lynch suggested that staff be ready to take up the Advisory Committee's normal business in case there is little testimony provided at the public hearing.

Mr. LaHaye made a motion, seconded by Ms. Lynch, that the public hearing be held, set for September 14<sup>th</sup>. Sen. Burns added that the public hearing should take place at 1:00 p.m. while the subcommittee could meet at 10:00 a.m. The vote was unanimous.

#### Subcommittee recommendations relating to review of existing public records exceptions enacted from 2005- 2012, pursuant to 1 MRSA §433

Staff presented the recommendations of the Public Records Exceptions Review Subcommittee, including recommendations from its December 2015 meeting and its July 20<sup>th</sup> meeting. The Committee approved of the Subcommittee's recommendations in all instances, except for the following.

With respect to the public records exception at 1 MRSA §402(3)(R) (Advisory Committee reference number 7), relating to Social Security numbers in possession of the Secretary of State, the Advisory Committee moved to set aside the item until further information could be gathered from the Secretary of State's Office by staff regarding why this public records exception was needed given that paragraph N of the same statute already exempts all Social Security Numbers from the definition of public records under FOAA.

Regarding 22 MRSA §1711-C(20) (Advisory Committee reference number 50), relating to the names and other identifying information of individuals in a state-designated statewide health information exchange, the Advisory Committee hesitated to take the recommendation of the subcommittee to repeal the provision. Staff provided an explanation of Maine's statewide health information exchange, which serves as a hub for connecting healthcare providers with electronic patient medical records from participating healthcare providers. HealthInfoNet is the state-designated organization managing this exchange. Staff relayed that through contacts with this organization they had expressed the belief that this public records exception had no effect because they were not a public body that falls within the requirements of FOAA. Additionally, HealthInfoNet communicated that it had never received a request for information from the public and saw no value in maintaining this public records exception. Staff offered that according to the criteria currently used by the Maine Supreme Court to determine whether an organization is a public body subject to FOAA, HealthInfoNet would very likely not be considered subject to FOAA. This organization is a private non-profit company established independently from any State action, the organization does not receive State funding and the State have any involvement or control over the exchange besides imposing certain security and confidentiality provisions. Staff offered that HealthInfoNet as a health information exchange is covered by two federal confidentiality laws, the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health (HITECH) Act.

Mr. Pringle expressed his concern about repealing this provision, citing the law of unintended consequences. Other members echoed this concern over unintended consequences and being uncomfortable with repealing the provision unless it was certain that this information could never be released under FOAA. Several members were of a contrary position, taking the view that if the public records exception was not needed then it should be eliminated. The Advisory Committee voted to table this item and staff agreed to gather further information.

With respect to the public records exception found at 29-A MRSA §1301 (Advisory Committee reference number 55), relating to the social security number of an applicant for a driver's license or non-driver identification card, this provision is similar to the other tabled item relating to Social Security Numbers in the possession of the Secretary of State. The Advisory Committee voted to also table this item in order for staff to get further information from the Secretary of State's Office.

*Proposal to require local boards and committees to record and retain the recordings of executive sessions*

Staff reviewed current Maine law regarding open meetings and executive sessions, 1 MRSA §§403, 405, 407. Staff pointed out additionally that the Maine Supreme Court has held that when the propriety of an executive session is challenged, the burden is on the public body to establish that the executive session was proper.

The Advisory Committee invited Rep. Hubbell to explain his proposal. Rep. Hubbell's described his proposal, which is to require local boards and committees to record executive sessions and preserve those records so that they may be legally discoverable in case of a dispute about the content or propriety of the discussion held during these executive sessions. Rep. Hubbell then suggested the Advisory Committee hear from his constituent, Robert Garland, former Town Councilor for Bar Harbor, who had brought the issue to his attention. The Advisory Committee then invited up Mr. Garland, who explained his experience with executive sessions and a personnel matter in Bar Harbor. During litigation involving the matter, Mr. Garland noted that what had transpired during the executive sessions was recalled much differently than how he had remembered it.

Mr. Higgins asked if an attorney can be present during an executive session and whether they can request that a transcript be made. Mr. Pringle addressed the question, stating that an individual who is the subject of an executive session has the right to request to be present, have their attorney present and can request that the meeting be public. This also includes the right to have a court reporter be present to take a transcript of the proceeding, he said. Mr. Higgins asked if the transcript would then be considered a public record, to which Mr. Pringle replied that it would not be, as it would be in the possession of that person and their attorney, though it could always be released at the prerogative of that individual.

Mr. Pringle acknowledged the concern prompting the proposal, but stated that he would be extremely reluctant to have executive sessions recorded. He stated that in his view, coming from his experience in the school board context, the administrative burden of recording and indefinitely keeping these recordings and ensuring their confidentiality into perpetuity outweighed the potential for abuse of executive sessions. He reiterated that the courts place the burden on the agency or public body holding an executive session to justify the propriety of that executive session if there is a legal challenge. A judge would make the determination regarding truthfulness and reliability of participants' recollections.

The Advisory Committee invited up a representative from the Maine Municipal Association, Garrett Corbin, to provide a municipal perspective on the issue. Mr. Corbin posited that it is important to balance the law so that the public interest does not outweigh privacy interests. This proposal, he noted, would discriminate against municipalities and local government in a way that is not done elsewhere in FOAA. He referred to the portion of the executive session statute that details what constitutes proper subject matter for an executive session, 1 MRSA §405(6-A)(1), noting that an executive session is only held if an individual's right to privacy or potential damage to reputation is involved. Mr. Corbin stated that making and keeping records of these executive sessions increases the likelihood of inadvertent disclosure of this sensitive information. He added that the law as it currently stands provides a remedy through the court system.

Ms. Lynch noted that executive sessions involve much more than just personnel matters, which seems to be the focus of the discussion. She asked Mr. Corbin whether, in these other contexts, were executive sessions to be recorded and legally discoverable, would that chill the candor of these municipal discussions? Mr. Corbin agreed that it would, relating feedback from some municipal representatives that had told him they would not hold executive sessions if this proposal went through.

After a bit more discussion, Mr. Higgins made a motion, seconded by Mr. Pringle, that the Advisory Committee not move forward to recommend any changes to the current law around executive sessions. The vote was unanimous.

### *The Criminal History Record Information Act (CHRIA) and the Judicial Branch*

The Advisory Committee opened up discussion on a topic raised at earlier meetings, regarding the Criminal History Record Information Act (CHRIA) and the Judicial Branch's recent reversal of its policy of making confidential case files for dismissed cases. Ms. Meyer stated that she was satisfied with the Judiciary's current policy. There was no interest by members in having any further discussion.

### *Anonymous FOAA requests*

In response to the Advisory Committee's request at its prior meeting for more information on the extent to which, if any, an agency may ask for the purpose of a FOAA requestor's request, staff began by reviewing current Maine law. Staff related that 1 MRSA §408-A provides the general principle that "a person has the right to inspect and copy any public record", and subsection 3 of that section provides that an agency or official "may request clarification concerning which public record or public records are being requested." Staff continued that an individual may be required to clarify their public records request by an agency, and that while nothing in FOAA prohibits an agency or public body from asking additional questions to a requestor, the requestor is not obligated to provide any other information to the agency and the agency may not discriminate in its response to the request regardless. Staff then directed the Advisory Committee to a handout with a comparison of other states' public records laws in regard to how they handle requestor identity and purpose.

Mr. Stout noted that often in the context of email requests, a requestor is anonymous by sheer virtue of their obscure email address and not by any intention of anonymity by the requestor. Mr. Pringle offered his opinion that a requestor should not be required to give their name or purpose when making a request for public records. Sen. Burns wondered if members thought a change should be made to FOAA to prohibit agencies from asking a requestor's name or purpose, with several members disagreeing that this was needed. Mr. LaHaye posed to the group whether there should be a distinction between commercial and non-commercial purposes of requestors. Mr. Higgins shared his view that if a record is open, it should be allowed to be used for whatever purpose the requestor wants. Mr. Pringle shared that the Advisory Committee has wrestled with the commercial/non-commercial distinction in the past, and could never work out how to precisely define the difference between the two. Mr. Parr noted that as a practical matter, even if there were a distinction made, a person can have someone else request a public record for

them, in order to get around the restriction. He also wondered what the State's policy would be for what to do with requestor information if collected.

The Advisory Committee voted unanimously to take no action on this topic. Rep. Monaghan noted that if there were major concerns regarding anonymous FOAA requests, such as voiced by Planned Parenthood, then those parties could raise this with their legislators to bring legislation forward in the next legislative session.

**Summary of September 14, 2016 meeting**

*[to be added]*

**Summary of October 5, 2016 meeting**

*[to be added]*

**VI. ACTIONS RELATED TO COMMITTEE RECOMMENDATIONS CONTAINED IN TENTH ANNUAL REPORT**

The Right to Know Advisory Committee made two recommendations in its tenth annual report. The legislative actions taken in 2016 as a result of those recommendations are summarized below.

<p><b>Recommendation:</b> Enact legislation authorizing the use of technology to permit remote participation in public proceedings by non-elected members of public bodies</p>	<p><b>Action:</b> A majority of the Judiciary Committee voted "Ought Not to Pass" on the recommendations of the Advisory Committee to authorize the use of technology to permit remote participation in public proceedings contained in LD 1586, <i>Act To Implement Recommendations of the Right To Know Advisory Committee Concerning Remote Participation in Public Proceeding</i>; however, a minority of the Judiciary Committee proposed an amendment that would have required a governmental entity to adopt a written policy governing remote participation by members that also describes how the policy meets the principles of FOAA. The bill and the amendment were not enacted.</p> <p>The Judiciary Committee also considered another bill related to remote participation in public proceedings, LD 1241, <i>An Act To Increase Government Efficiency</i>, which was carried over from the First Regular Session to the Second Regular Session. As finally enacted, LD 1241 permits the board or commission of each of four State bonding authorities (the Maine Governmental Facilities Authority, the Maine Health and Higher Educational Facilities Authority, the Maine State Housing Authority and the Maine Municipal Bond Bank) to conduct public proceedings with</p>
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	members participating via remote access technology in certain circumstances. LD 1241 was finally enacted as Public Law 2016, chapter 449.
<b>Recommendation:</b> Continue without modification 24 of the existing public records exceptions enacted after 2004 and before 2013	<b>Action:</b> No action by the Legislature was necessary since the Advisory Committee recommended no changes to the existing public records exceptions that were reviewed.

## VII. RECOMMENDATIONS

Arising from its activities and discussions in 2016, the Advisory Committee makes the following recommendations in this, its eleventh annual report.

- Encourage the Judiciary Committee to consider proposed legislation to review the current public records exception that protects as confidential records provided by a railroad company describing hazardous materials transported by rail in the State**  
*{decided at August 17<sup>th</sup> meeting}*

At the Judiciary Committee's request, the Advisory Committee reviewed the public records exception in current law that protects as confidential records provided by a railroad company describing hazardous materials transported by the railroad company that are in the possession of a state or local emergency management agency or law enforcement agency, a fire department or other first responder. See 1 MRSA §402, sub-§3, ¶U. The Judiciary Committee's request was prompted by media articles following enactment of the exception indicating that the public's access to information about the transportation of crude oil through the State may be limited and your interest in ensuring that the public have an additional opportunity to comment and, if necessary, to recommend changes to current law.

The Advisory Committee discussed the public records exception and agreed that the exception may benefit from additional consideration. The Advisory Committee recommends that the Judiciary Committee consider submitting a committee bill to the First Regular Session of the 128<sup>th</sup> Legislature so that the current exception may be fully vetted by the Legislature in a manner that allows the most meaningful participation by stakeholders, state and local government entities and other members of the public. The Advisory Committee believes that the current exception is not intended to prevent public access to summary or aggregate information about the transportation of hazardous materials by rail in the State, particularly crude oil, or to prohibit disclosure of information about spills or discharges of hazardous materials. The Advisory Committee also expressed the concerns about the current exception as written.

*See correspondence in Appendix \_\_\_.*

- ❑ **Advise the Judiciary Committee about guidelines for considering proposed legislation relating to the confidentiality of personal information about professional and occupational licensees and applicants** *{final decision pending review of draft letter at September 14<sup>th</sup> meeting}*

*{discussion to be added following September 14<sup>th</sup> meeting}*

- ❑ **Continue without modification certain existing public records exceptions enacted after 2004 and before 2013** *{only reflects Subcommittee recommendations adopted at August 17<sup>th</sup> meeting; additional recommendations to be added if further recommendations are adopted}*

The Advisory Committee recommends that the following exceptions enacted after 2004 and before 2013 be continued without modification.

- ◆ Title 1, section 402, subsection 3, paragraph O, relating to personal contact information concerning public employees other than elected officials;
- ◆ Title 1, section 1013, subsection 2, relating to the identity of a requestor of Commission on Governmental Ethics and Election Practices opinions;
- ◆ Title 1, section 1013, subsection 3-A, relating to complaint alleging a violation of legislative ethics;
- ◆ Title 1, section 1013, subsection 4, relating to Commission on Governmental Ethics and Election Practices records other than complaints;
- ◆ Title 12, section 8005, subsection 1, relating to social security number, addresses, phone numbers, email addresses of forest landowners owning less than 1,000 acres;
- ◆ Title 12, section 8005, subsection 2, relating to social security numbers, forest management plans and supporting documents of activities for administering landowner assistance programs;
- ◆ Title 12, section 8005, subsection 4, relating to forest management information designated confidential by agency furnishing information;
- ◆ Title 12, section 10110, relating to a person's email address submitted as part of the application process for a hunting or fishing license;
- ◆ Title 12, section 12551-A, subsection 10, relating to smelt dealers reports, including name, location, gear and catch;
- ◆ Title 14, section 6321-A, subsection 4, relating to the financial information disclosed in the course of mediation under the foreclosure mediation program;

- ◆ Title 17-A, section 1176, subsection 1, relating to information that pertains to current address or location of crime victims;
- ◆ Title 17-A, section 1176, subsection 5, relating to request by crime victim for notice of release of defendant;
- ◆ Title 21-A, section 196-A, relating to information contained electronically in the central voter registration system;
- ◆ Title 21-A, section 1003, subsection 3-A, relating to investigative working papers of the Commission on Governmental Ethics and Election Practices;
- ◆ Title 21-A, section 1125, subsection 3, relating to records of individuals who made Clean Elections qualifying contributions over the Internet;
- ◆ Title 22, section 2425, subsection 8, relating to medical marijuana registry identification cards;
- ◆ 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 29-A, section 1301, subsection 6-A, relating to the social security number of an applicant for a drivers' license or non-driver identification card;
- ◆ Title 30-A, section 4706, subsection 1, relating to municipal housing authorities;
- ◆ Title 35-A, section 122, subsection 1-B, paragraph G, relating to information, as it pertains to the sale, lease or use of state-owned land or assets under the provisions of this section or activities in preparation for such sale, lease or use in the context of energy infrastructure corridors;
- ◆ Title 36, section 6271, subsection 2, relating to an application, information submitted in support of an application and files and communications in relation to a municipal property tax deferral program for senior citizens;
- ◆ Title 38, section 580-B, subsection 11, relating to records held by the Department of Environmental Protection or its agents regarding individual auctions administered under the carbon dioxide cap-and-trade program; and
- ◆ Title 38, section 1310-B, subsection 2, relating to hazardous waste information, information on mercury-added products and electronic devices and mercury reduction plans.

The Advisory Committee recommends that the following exceptions be indefinitely postponed and removed from the review process.

- ◆ Title 1, section 402, subsection 2, paragraph G, relating to committee meetings pertaining to interscholastic sports (*review not necessary because exception is not related to a public record and is not required by law*); and
- ◆ Title 21-A, section 1125, subsection 2-B, relating to records of individuals who made Clean Elections gubernatorial seed money contributions over the Internet (*provision repealed by Citizen's Initiative*)

## VIII. FUTURE PLANS

In 2016, 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 enacted after 2004 and before 2013. The Advisory Committee looks forward to a full year of activities working with the Public Access Ombudsman, the Judicial Branch and the Legislature to implement the recommendations included in this report.

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**APPENDIX A**

**Authorizing Legislation: 1 MRSA §411**

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**APPENDIX B**

**Membership List**

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APPENDIX C

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**APPENDIX D**

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**APPENDIX E**

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**APPENDIX F**