

Right to Know Advisory Committee

July 20, 2016
Meeting Summary

Convened 1:09 p.m., Room 438, Maine State House, Augusta

Present:

Sen. David Burns
Rep. Kim Monaghan
Suzanne Goucher
Richard LaHaye
Judy Meyer
Kelly Morgan
Chris Parr
Linda Pistner
Harry Pringle
Helen Rankin
William Shorey
Eric Stout

Absent:

A. J. Higgins
Mary Ann Lynch
Luke Rossignol

Staff:

Craig Nale, Henry Fouts, Colleen McCarthy Reid

Welcome and Introductions

Advisory Committee members introduced themselves.

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 FOAA 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 FOAA requests. This included a letter dated June 24th 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 1st 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 18th, 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 24th 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 MRS §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.

Future meetings

The Advisory Committee's third meeting is scheduled for Wednesday, August 17th, at 1:00 p.m. A fourth meeting will be held on Wednesday, September 14th at 1:00 p.m. All meetings will be held in Room 438 of the State House.

The next meeting of the Public Records Exceptions Review Subcommittee will be at 10:00 a.m. on Wednesday, August 17th in Room 438 of the State House.

The meeting was adjourned at 4:57 p.m.