

Right to Know Advisory Committee  
September 23, 2010  
Meeting Summary  
DRAFT

Convened 1:20 p.m., Room 438, State House, Augusta

Present:	Absent:
Sen. Barry Hobbins, Chair	Karla Black
Rep. Dawn Hill	Mark Dion
Shenna Bellows	Harry Pringle
Robert Devlin	
Richard Flewelling	
Ted Glessner	
Suzanne Goucher	
A.J. Higgins	
Mal Leary	
Judy Meyer	
Kelly Morgan	
Linda Pistner	
Bruce Smith (for Harry Pringle)	
Chris Spruce	

Staff:  
Peggy Reinsch, Carolyn Russo & Marion Hylan Barr

Advisory Committee Chair Senator Barry Hobbins convened the meeting of the RTKAC at 1:20 p.m. Members introduced themselves and Chair Hobbins recognized and welcomed the new RTKAC extern, Sean O'Meara. Sean is a student at the University of Maine School of Law and will be working on research and projects for the RTKAC this semester. When in Augusta, he will be working out of the Office of the Attorney General.

### **Legislative Subcommittee Report**

Subcommittee Chair Chris Spruce presented the recommendations of the Legislative Subcommittee to the RTKAC for discussion and committee action. The following outlines the tasks of the Legislative Subcommittee, their recommendations and the RTKAC action.

- Examine use of communication technologies to ensure that decisions are made in proceedings that are open and accessible to the public. (adopted option #3, page 3A-1)

Mr. Spruce moved adoption of option 3 of the 4 options presented on draft p. 3A-1 (amending the declaration of policy and rules of construction under Title 1, §401). Option 3 is a clear statement that communications are not prohibited among public body members, but that those communications may not be used to defeat the purposes of the freedom of access laws. Mr. Flewelling agreed that the option captured First Amendment rights and provides a caution to members. Ms. Pistner also agreed that this option was preferable as it speaks to the subchapter,

and Chair Hobbins thought it struck a good balance. The RTKAC adopted the recommendation 12-0.

- Consider revision of penalties for violations of the freedom of access laws. (no change)

Although the Subcommittee discussed this issue at length and reviewed other states' approaches to penalizing violation of the freedom of access laws, the Subcommittee voted to propose no statutory change at this time. Instead, members agreed on continuing to focus more on education and outreach to public officials. Mr. Spruce noted that Mr. Leary, who had not yet arrived at the meeting, was most interested in looking at penalties for individual violators and might want to speak to the Committee on that matter at some point.

- Determine if partisan party caucuses should be specifically excluded from the definition of "public proceedings"? (no change)

The Subcommittee discussed this and noted that most caucuses are open. Although it would be great if all were, the Subcommittee recognized that the Legislature has authority to control its internal activities and that courts will not support challenges to that authority. The Subcommittee therefore recommends no change at this time.

- Examine protection of private information contained in e-mail and other forms of communication that are sent and received by public officials, particularly communications between elected public officials and their constituents. (tabled)

The Subcommittee was divided on this issue. Ms. Meyer did not support any change. She noted that corresponding with government officials creates vital public records. Also requiring public officials to know what information to redact and to actually perform the redaction would be a big burden. Ms. Meyer believes the better approach is to educate the public so that they know that any correspondence to a government official may be public. Mr. Spruce supported and moved acceptance of the proposed draft (p. 3A-2), that states that communications between a public official and a person is a public record except for information in that record that is excepted from the definition of "public record", is designated confidential by statute or would be confidential if in the possession of another public agency or official. Ms. Bellows seconded the motion. Ms. Pistner agreed with Ms. Meyer's concerns about how to draft something that did not sweep in unintended information. Mr. Smith noted that there may be First Amendment implications, like that in the case of disclosing signatures on referendum petitions. Ms. Meyer further expressed her opposition to the draft, as it would eliminate a layer of accountability. Mr. Higgins asked who would be the gatekeepers – who would decide if information in an email should be red-flagged for redaction? Staff reminded the group that the Subcommittee had also recommended that agencies post a disclaimer on their websites that notifies the public that any communication may be public. After lengthy discussion, Ms. Goucher requested more information regarding what other states are doing in this area and asked if a tabling motion would be appropriate. Chair Hobbins suggested that feedback from other groups would be helpful. Mr. Spruce moved to table, and the vote was 12-0.

- Examine policy on whether e-mail addresses are public records. (no change but recommend website disclaimer or warnings about public nature of emails)

Mr. Spruce explained that the Subcommittee recommended no statutory change, but that the group did support requesting government agencies to post on their websites a disclaimer or

warning that if a person communicates with an agency via email, that email and email address are probably a public record. Ms. Bellows expressed her reservations about this issue and the difficulty balancing public accountability with privacy. She noted that an individual email address does not pertain to government operations and instead is being obtained for marketing purposes. Ms. Goucher expressed that personal privacy is a fallacy today; all personal information is out there, including email addresses.

- Review of Central Voter Registry. (no change recommended)

Mr. Spruce explained that the Subcommittee reviewed the work of the Legal and Veterans' Affairs Committee and was satisfied that they did a thorough job of weighing the public and private concerns in the Central Voter Registry; therefore the Subcommittee proposed no additional changes.

- Examine policy for Social Security Numbers (SSNs). (adopted draft, page 3A-3)

The Subcommittee reviewed the legislation that was proposed last year that did not pass due to many issues regarding time and redaction and reviewed other states' approaches dealing with handling SSNs in public records. Chris presented the Subcommittee recommendation, which is to adopt a "minimalist" approach and amend Title 1, §402 to specify only that SSNs are not public records. While all agreed in concept, some raised concerns about how this change will practically work. Mr. Devlin noted that SSNs are deeply embedded in county deeds collections, and Ms. Meyer pointed out the SSNs that are collected on municipal records and then migrate to the courts. How do we iron out the redaction process? What are the details? Ms. Bellows explained that the Subcommittee began with more details but believes that this is an important statement to make: SSNs are not public records. Ms. Bellows also understands that logistical problems with no limitations on collection, storage or release of the SSNs. Ms. Pistner stated that it is important that we protect the agencies that collect SSNs. Mr. Spruce reiterated that this is not a complete fix, but it is a step forward. Ms Reinsch reminded the Committee that this is a way to protect people who are passing out the records; because a SSN is not a public record, a requester has no right to the SSN and the custodial agent can redact. Staff also explained that because something is not a public record, it does not mean that it is necessarily confidential. Mr. Flewelling thought that this distinction was important. Ms. Pistner also reminded the Committee that something is not a public record unless it has a clear public purpose.

Mr. Spruce moved acceptance of the recommendation, Mr. Flewelling seconded it, and vote was unanimous. (12-0)

- Examine use of technology in attending meetings. (tabled)

Mr. Spruce introduced the Subcommittee's draft proposal (page 3A-4), which was not unanimous. The draft proposal creates requirements for public proceedings that involve members who are not physically present. In addition to this draft that looks to establish uniformity in meetings that involve communication from members who are not physically present, the Subcommittee looked at four existing examples of entities whose members are authorized by statute to participate from other locations. The four are the Finance Authority of Maine, the Emergency Medical Services Board, the Ethics Commission and the Workers' Compensation Board. Since input from the affected agencies has not yet been solicited, the item

was tabled and staff was asked to send a letter out under Chair Hobbins and Subcommittee Chair Spruce's names that will be sent to solicit feedback from the agencies.

- Keeping records of public proceedings. (adopted draft p. 3A-4)

Mr. Spruce presented the Subcommittee's recommendation, which was not unanimous and which may be a local government mandate. The Subcommittee discussed what is a "meeting" but narrowed the initial draft to limit recordings of public meetings to include the date, time and place; the members, present and absent; and all motions and votes taken. The general substance of all matters proposed and discussed need not be included in the record. Mr. Flewelling noted that this change addressed his concern; now, if there is no motion or vote, no record need be made. Mr. Smith raised the concern brought earlier in Subcommittee by Mr. Pringle, which was that these requirements seemed very burdensome on subcommittees of school boards. Jeff Austin from the Maine Municipal Association pointed out that some boards have such requirements now and that it may be prudent to distinguish when a vote is required to be taken from an action that really doesn't need a vote (i.e., where to have lunch). Mr. Spruce moved to accept the proposed draft as is, Mr. Flewelling seconded the motion. The vote was taken, and it was 10-1. (Mr. Smith voted no, and Mr. Higgins was not present for the vote.)

- Examine scope of review process (1 MRSA §434 criteria). (adopted draft, p. 3A-6)

Mr. Spruce presented the Subcommittee draft that expands the criteria for review to specify that the review committee has authority to consider factors that affect the accessibility of public records (i.e., fees, request procedures and timeliness of responses), as well as the repeal, modification and continuation of public records exceptions. Mr. Spruce moved to accept the recommendation, Ms. Goucher seconded the motion and the Committee vote was unanimous (11-0).

### **Bulk Records Subcommittee Report**

Subcommittee Chair Bob Devlin reported that the group has met twice and is looking at a number of issues. At its meeting on September 23rd, the Subcommittee reviewed a draft proposal that would incorporate into the freedom of access laws language that was recently enacted pursuant to Public Law 2009, c. 575 amending the law dealing with reasonable fees in the registry of deeds statutes. Ms. Meyer explained that the court will be looking at both the old and new language regarding fees shortly, as it hears the MacImage case against several counties. Based on the pending litigation, the Subcommittee chose to wait on a recommendation regarding this proposal.

The Subcommittee also identified the need to have additional information before it can go forward. Information that the Subcommittee will review at its next meeting(s) includes:

- Examples of other states' definitions of "bulk data" and "bulk records";
- Input from agencies and other governmental entities regarding the proposed draft for reasonable fees;
- Explanations from agencies and other governmental entities regarding their statutory authority to set fees by rulemaking and whether the proposed language would conflict with their existing authority; and

- A list of concerns, problems, costs, questions from agencies, municipalities and individuals regarding the proposed change in law that exempts SSNs from public records under the freedom of access laws (may require public hearing in order to have necessary interested parties weigh in).

Another issue that was discussed at the last meeting was the use of the freedom of access process to circumvent InforME fees.

### **Public Records Exceptions Subcommittee**

Subcommittee Chair Shenna Bellows reported that the Subcommittee will hold its first meeting on September 27th. At that meeting the Subcommittee plans to begin its evaluation of each public records exception that is scheduled for review this biennium (Titles to review include 22; 22-A; 23; 24; 24-A; and 25); review the FAME exceptions that were removed from LD 1792 by the Judiciary Committee and receive an update on the status of the redraft of the Criminal History Record Information Act (CHRIA).

### **Updates on Other Issues**

#### **Working Group on Bulk Records convened at the request of the State and Local Government Committee**

Staff reported that this group is tentatively scheduled to meet next on October 26th. They have been on hold pending the litigation involving MacImage and the counties.

#### **Education and training for elected public officials**

The Committee believes that Legislators should receive education and training about the right to know laws at the beginning of every legislative session, even if they have received the training before. Ms. Pistner, who provides the legislative training, indicated that she would like to hear feedback from the Legislators regarding the training. She wants to ensure that we are providing them with what they need. Mr. Leary asked the Committee if we should expand training to appointed boards and others. Mr. Flewelling explained that elected municipal officials are required to receive training; however, appointed officials, who in many cases perform the same duties as elected officials (i.e., some clerks and assessors), are not required to receive the training. He would not quarrel with expanding training to groups who perform the same functions as elected officials. Ms. Meyer agreed and suggested that it was time to look back and tweak the education\training law if problems exist. Ms. Meyer said that many municipal employees who also do the same jobs as elected officials are not trained, and supervisors for persons who have to administer the laws do not have the training their employees are required to have. As a first step, Mr. Leary moved to have staff draft language that requires appointed clerks to have the same mandatory training as elected clerks. Mr. Devlin suggested that department heads and supervisors who receive freedom of access requests also be strongly encouraged to receive the training. Mr. Flewelling proposed that the Committee take a more comprehensive look before making recommendations.

#### **Future meetings**

- Thursday, October 21 at 1:00 p.m., Room 438, State House, Augusta

- Thursday, November 18 at 1:00 p.m., Room 438, State House, Augusta

**Other issues**

- Extern Sean O'Meara presented to the Committee his Freedom of Access website recommendations (handout), which was well received.

Adjourned 4:10 p.m.