

Right to Know Advisory Committee
October 11, 2012
Meeting Summary

Convened 1:10 p.m., Room 438, State House, Augusta

Present:

Sen. David Hastings
Rep. Joan Nass
Perry Antone
Shenna Bellows
Joe Brown
Richard Flewelling
AJ Higgins
Bill Logan
Judy Meyer
Kelly Morgan
Linda Pistner
Bruce Smith (for Harry Pringle)

Absent:

Mike Cianchette
Mal Leary
Mary Ann Lynch
Mike Violette

Staff:

Curtis Bentley
Colleen McCarthy Reid
Peggy Reinsch

Introductions

Senator Hastings called the meeting to order and asked all the members to introduce themselves. He welcomed Bruce Smith, sitting in for Harry Pringle, representing school interests. (Mr. Smith abstained from all votes.) Senator Hastings also noted that Ted Glessner had withdrawn as the representative of the Judicial Branch and that Mary Ann Lynch is taking his place, although she could not attend the meeting.

Introduction of Law School Extern

Katherine Lybrand is this year's Law School Extern with the Right to Know Advisory Committee. The externship spans the fall term of the University of Maine School of Law. Ms. Lybrand is a third-year student and Linda Pistner, Deputy Attorney General, is the official supervisor of the externship. Ms. Lybrand has been working with Ms. Pistner as well as the newly-appointed Public Access Ombudsman. She provided the Advisory Committee with a memo outlining her recommendations for changes and improvements in the State's Freedom of Access website.

Introduction of Public Access Ombudsman

Brenda Kielty, appointed by Attorney General Schneider as the new Public Access Ombudsman, introduced herself and thanked the Advisory Committee members for all their

hard work to make her position possible. Ms. Kielty is transitioning from a position as a special assistant to the Attorney General, but will be in the Ombudsman position full-time soon. She recognizes there is lots to do, but is looking forward to all it entails. She will be scrupulous about maintaining her independent and neutral role, advocating for the integrity of the Freedom of Access Act. She outlined some ideas for activities, noting that she is still in the early stages of setting up a new division within the Attorney General's Office. She said that although the Attorney General has authority to file a lawsuit to enforce the statute, the time limits are strict. Ms. Lybrand is researching other states' remedies and Ms. Kielty will be looking at all potential options. She thinks the most important part of the role is to educate the public as well as public officials. Ms. Kielty mentioned that the new role of Public Access Officer – each public agency is required by Public Law 2011, chapter 662 to designate an employee to take the lead FOA role for the agency – will be very helpful to the public as well as agencies; she hopes to provide resources for the new Public Access Officers, as well.

Joe Brown mentioned that Hancock County has already begun implementing the new law, and Perry Antone reminded the members that Maine law enforcement agencies already have FOA policies, as required by law for the past few years. Richard Flewelling said that the Maine Municipal Association has been educating municipalities and their employees since June, recognizing that there has to be a transition period for towns and agencies to appoint their Public Access Officers and have them complete the required training.

Ms. Kielty said more information about the Ombudsman position will be available on the website soon, and the different methods of contacting her will be included. She provided her phone number and email address: 626-8577, Brenda.Kielty@maine.gov. She is already receiving calls and email. <http://www.maine.gov/foaa/ombudsman/index.htm>

Reports of Subcommittees; Discussion of Subcommittee Recommendations

- Bulk Records Subcommittee

Judy Meyer reported for the Bulk Records Subcommittee, because Subcommittee Chair Michael Cianchette was absent. Ms. Meyer reminded the Advisory Committee that the genesis of the Subcommittee was the dispute between the county registries of deeds and the private company MacImage of Maine, LLC, concerning MacImage's request for records, in digital format, and the cost and timing of those copies. The Subcommittee was reluctant to weigh into the turmoil while both the Legislature and the courts were trying to make sense of all the interests involved. The Law Court's ruling in March of this year settled the issue for the registries of deeds, and the Legislature had enacted separate language that addressed the concerns that had been raised by the State Police with regards to accident reports.

At the request of Ms. Meyer, the Advisory Committee voted to disband the Bulk Records Subcommittee. It was requested that the Ombudsman keep an eye on the issues, as members know the question have not really gone away. The Subcommittee can be reconstituted as necessary.

- Encryption Subcommittee

Ms. Pistner presented the report of the Encryption Subcommittee, which was included in the packet of materials. She thanked staff and Assistant Attorney General Laura

Yustak Smith, and noted that the Department of Public Safety had been very knowledgeable and helpful. The two meetings were very collegial discussions, and everyone is pretty comfortable that current encryption practices are fine, and the transition from analogue to digital radio systems was the initial cause of concern.

The Subcommittee made two recommendations. First, propose no statutory changes. Second, that the Advisory Committee send a letter to the Board of Trustees of the Maine Criminal Justice Academy requesting that it consider creating a model encryption policy for consideration by local law enforcement agencies that reflects the current practices, and requesting that the board report back to the Advisory Committee on any decisions or actions taken pursuant to the request. The Advisory Committee unanimously adopted both recommendations.

- Legislative Subcommittee

Ms. Meyer reported that the Legislative Subcommittee met three times and covered five topics.

- The application of the Freedom of Access laws to Maine Public Broadcasting - Issue raised by the late Mike Brown when MPBN refused to provide certain financial information about employees that he requested, saying the information was not “public” under the FOA laws. The manner in which the request was unnecessarily harsh. Mark Vogelzang (President and CEO of MPBN) and Jim Zimpritch (MPBN’s attorney) attended the Subcommittee meeting and provided written remarks. The Subcommittee found no compelling need to amend the statute and make public all the records of MPBN, a private non-profit corporation.

The Subcommittee recommended no change, and the Advisory Committee unanimously agreed. AJ Higgins abstained, as an employee of MPBN, and Mr. Brown abstained because he did not have sufficient information to make a decision.

- Status of email addresses collected by schools and towns - Issue raised by Rep. Mary Pennell Nelson via letter to the Advisory Committee. Falmouth schools received a request for parents’ emails. The Subcommittee discussed whether email addresses are confidential and should they be and also discussed the practical problems with redacting all email addresses from otherwise public documents. Harry Pringle had argued that the email addresses are probably confidential under FERPA, but the State should make it clear. Mr. Pringle offered to prepare draft legislation. The Subcommittee discussed the draft on two occasions but finally decided to not take action until the new Public Access Ombudsman can collect information to determine if it is a problem.

The Subcommittee recommended no change in the statute (although Rep. Nelson may propose legislation independently). The Subcommittee also recommended that the Advisory Committee officially request the Public Access Ombudsman to look at the issue, collect information and report back. The Advisory Committee unanimously supported the recommendations, although Shenna Bellows abstained because the ACLU would probably support Rep. Nelson’s legislation.

- Balancing the public disclosure of elected officials' email with the availability of technology and other systems to maintain records and provide public access (PL 2011, c. 264) – The Legislature had requested that the Advisory Committee provide guidance on maintaining, storing, sorting and retrieving email. The Subcommittee invited David Cheever, the State Archivist, to discuss issues of maintaining, storing and accessing records, especially digital records such as email. Mr. Cheever said it was a national problem, there is no solution yet, whatever the solution is will probably cost a lot of money, and that this is an area where Maine should NOT be a leader. If legislators are looking for clarity, the FAQs and the retention rules are the best resources available. The Legislature's own record retention schedule (under Title 5, chapter 6) does not include "correspondence," however, and the Subcommittee thought that should be corrected.

The Subcommittee recommended that the Frequently Asked Questions be amended to identify the requirements and any guidance with regard to state and local record retention schedules. The Subcommittee also recommended that the Legislature consider revising its own record retention schedule to cover "correspondence." The Subcommittee recommended that the training for legislators include best practices with regard to email.

The Advisory Committee discussed all the recommendations and recognized that the proposed changes to the FAQs needed a little more work. The Advisory Committee voted unanimously to table the recommendations until the next meeting. Ms. Kiely will continue to rework the questions and answers.

- Use of technology in public proceedings to allow member participation from remote locations - Issue has been under discussion for a few years: the FOA Act is silent on whether members not present at a public proceeding of a board, commission or other body can participate via telephone, video link, etc. Four entities (FAME, Workers' Comp Board, Ethics Commission and Emergency Medical Services Board) have specific statutory authorization to meet via telephone or other technology in certain circumstances; all requested exemption from the proposed language.

The Subcommittee developed draft legislation, a key provision of which is that an entity can use the procedure only if it has adopted a policy that authorizes such participation. Ms. Meyer walked the Advisory Committee through the draft, and noted that a minority of the Subcommittee does not support the language as drafted, and that Mr. Pringle had abstained from the Subcommittee vote because the school boards had not decided whether to support it.

The Advisory Committee discussed the draft, including the limitation on participation when additional materials are present at the public proceeding. Mr. Brown said he would like to run the draft by his county commissioners. He also expressed his support for the concept that county commissioners, if not other members of boards and commissions, should have "face time" with each other. Mr. Flewelling clarified that this would not apply to "Town Meetings" because that form of municipal government has its own specific statutory requirements. Ms. Meyer said the whole

idea is to extend a courtesy to a member who is not able to attend. Mr. Smith noted that the draft addresses not just a public access issue but a governance issue as well.

The Advisory Committee voted to table the proposal, giving time for Advisory Committee members to share the draft with the organizations and constituents they represent, as well as providing an opportunity for the supporters of various versions to prepare specific explanations.

- Templates for drafting specific confidentiality statutes - Another topic that has been under consideration for a few years, requested by the Judiciary Committee. The Subcommittee agreed to recommend the “templates” prepared by staff and a former law School Extern as guidance for drafting new statutes that protect information provided by an applicant for financial or technical assistance provided by the State, town or other public entity. Ms. Bellows noted that standard language makes the statutes more understandable and the review of public records exceptions a much easier process. The Advisory Committee unanimously recommended that the templates be made available to agencies and legislative drafters.

- **Public Records Exception Subcommittee**

Ms. Bellows will propose a full slate of public records exceptions for approval at the next meeting. She presented a draft letter to the Department of Health and Human Services concerning two programs, never implemented, that contain public records exceptions. Although the Health and Human Services Committee of the Legislature recommended repeal of the programs, the Subcommittee is reluctant to recommend the elimination of entire programs when the Subcommittee’s focus is really centered on public records exceptions. The letter would identify the programs and recommend that if the Department believes they should be eliminated, it would be best if the Department proposed such legislation itself. The Advisory Committee unanimously agreed to send the letter.

Ms. Bellows mentioned two issues that she expects the Advisory Committee to deal with at the next meeting. First, the potential repeal of the public records exceptions concerning hospital and health care facility sentinel events reporting: the Subcommittee is currently divided, with the medical community opposing any change. Second, the public records exception protecting records about public-private partnerships on transportation projects. The Subcommittee heard several comments from members of the public concerned about the proposed East-West Highway project, and how the existing law would limit the availability of information until a project proposal is complete. The Subcommittee is divided on going forward with any recommendation, but members are trying to reach a compromise.

Future Meetings

The Advisory Committee scheduled the following meetings for 2012:

- Thursday, November 15, 2012 at 1:00 pm, Room 438, State House; and
- Thursday November 29, 2012 at 1:00 pm, Room 438, State House.

The following subcommittee meetings were also scheduled:

- Public Records Subcommittee, Thursday, November 8, 2012 at 9:00 am.

Senator Hasting adjourned the meeting at 3:30 p.m.

Respectfully submitted,
Peggy Reinsch, Colleen McCarthy Reid and Curtis Bentley