

Legislative Subcommittee of the Right to Know Advisory Committee  
June 28, 2010  
Meeting Summary

Convened 1:06 p.m., Room 438, State House, Augusta

Present:

Chris Spruce, Chair  
Robert Devlin  
Richard Flewelling  
Judy Meyer  
Phyllis Gardiner  
Harry Pringle  
Shenna Bellows  
Kelly Morgan  
Karla Black

Absent:

Mal Leary  
Linda Pistner

Staff:

Peggy Reinsch  
Carolyn Russo

Legislative Subcommittee Chair, Chris Spruce, convened the meeting of the Legislative Subcommittee of the Right to Know Advisory Committee at 1:06 p.m. and asked the members to introduce themselves. Chris Spruce then directed the Staff to steer the committee through its list of tasks.

### Review of Legislative Subcommittee Tasks

The following ten tasks are under the purview of the Legislative Subcommittee. Staff gave a brief overview of all ten and highlighted numbers 1, 4, 5, and 8 as the four of focus for the present meeting.

1. Use of communication technologies to ensure that decisions are made in proceedings that are open and accessible to the public;
2. Consideration of revision of penalties for violations of the freedom of access laws;
3. Whether partisan party caucuses should be specifically excluded from the definition of "public proceedings";
4. 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;
5. Policy on whether e-mail addresses are public records;
6. Central Voter Registry;
7. Social Security Numbers;
8. Use of technology in attending meetings;

9. Keeping records of public proceedings; and
10. Scope of review process (1 MRSA §434 criteria)

## **Communication Technologies**

Senator Nutting and Representative Dostie shared their concerns about 1) penalizing full boards for the impropriety of one member; 2) for members of a body working behind the scenes and making decisions behind closed doors, especially in hiring and firing; and 3) for members of a body communicating through serial e-mails and coming to a meeting with predetermined decisions.

Staff followed with an overview of the use of communication technologies to ensure that decisions are made in proceedings that are open and accessible to the public. As part of the overview, a copy of LD 1551, *An Act To Further Regulate Communications of Members of Public Bodies* was supplied as was the rationale for the bill and the concerns and issues raised during the public hearing and work session for the bill. The following were also supplied for consideration and discussion:

- A copy of the Law Court case *Marxsen v. Board of Directors, M.S.A.D. No. 5*, (Me. 1991);
- State by State Statutes and Interpretations by Courts and Attorneys General with regard to public meetings via e-mail;
- The Maine Freedom of Access Webpage containing the “Frequently Asked Question” answer to whether members of a body can communicate with one another by email outside of a public proceeding;
- A concept draft of an amendment to prevent serialized meetings to circumvent the Freedom of Access laws proposed by Sig Schutz; and
- A detailed worksheet dealing with issues and concerns surrounding communication technologies.

This led to a discussion of the subcommittee members about how the current law is interpreted with regard to communication technologies and public meetings. The focus was on whether deliberating between members was appropriate before a meeting. The general consensus of the present Law Court interpretation of the Freedom of Access laws is that deliberating an issue beforehand is okay as long as it is to get information to make an informed decision at a public meeting. It is not legal to make collective decisions beforehand. Rep. Dostie raised the question of whether defining substantive matter versus general information would help clarify the issue. It was offered that such definitions are difficult in the abstract. There was general agreement that a conference call, if the public could hear the discussion, would be acceptable if everyone at the meeting agreed beforehand. Sen. Nutting reasserted his worry about serial calls to all members before a meeting.

## **Use of Technology in Attending Meetings**

Staff shared a Right to Know Advisory Committee Revised Proposed Draft dated 12/1/09 on the limitation on meetings using technology. Also presented was a list of ten considerations for discussion. Dialogue ensued regarding the listed considerations.

Subcommittee members discussed how the exception in the Ethics Commission's statute works and cited the need for adequate safeguards. There was general agreement that currently the FOIA laws mean members must be physically present unless a specific statute allows using remote participation. It was felt that a review of this restriction is worth considering given the advances in technology and the cost of bringing members of statewide boards, for example, together in one location. Some members cautioned that absentee voting would be difficult because members not in attendance would not be able to view documents. This led to a further discussion about safeguards such as having proper equipment to fax material to absentee members, absentee members being audible to all, precluding absentee members from participating in quasi-judicial proceedings where the credibility of witnesses must be evaluated, and having individual boards establish clear policies for remote participation. All agreed that a physical location was necessary for a meeting to take place and public notice was required. The subcommittee members agreed that the provided draft legislation, along with Sig Schutz' comments, was a good start and asked Staff to prepare an updated revision that reflected the subcommittee's concerns.

## **Protection of private information contained in e-mail and other correspondence with elected and other officials**

Staff provided an overview of the discussion that took place in the Judiciary Committee about LD 1802, *An Act to Exempt Personal Constituent Information from the Freedom of Access Laws*, sponsored by Rep. Hill. Included in the materials was a chart comparing the approaches by different states with regard to e-mail sent or received by legislators, as well as the application of the federal Freedom of Information Act (FOIA) to various forms of private information. It was noted that the FOIA does not apply to the federal legislative branch.

Many people write to their legislators, the Governor and other government officials and reveal very personal, private information in the course of requesting assistance or advocating a position on policy matters. Subcommittee members doubted that the authors ever intended or considered that the information would be considered public and released as governmental public records. There was concern about the concept, as included in the original draft of LD 1802, that confidentiality rested on whether the person submitting the information wanted that information to be kept confidential.

Peter Merrill, who works with the Maine State Housing Authority, explained what happens in his work. He receives e-mails from legislators laying out constituents' personal details in a quest for housing or heating assistance, especially in the winter. Mr.

Merrill responds back, and there can be significant communication. He knows that the e-mails would have to be released as public records if anyone requested them, and that troubles him. Discussion revealed that the same type of correspondence is received by the Governor's Office. Although a warning or disclaimer might put people on notice, it might also discourage them from seeking help.

The Subcommittee turned its attention to a proposed amendment that Rep. Hill provided the Judiciary Committee at the public hearing on LD 1802. It narrowed the scope of the information to be protected, tying it somewhat to what is already designated as confidential by statute. The Subcommittee requested Staff to rewrite the proposed amendment to incorporate the changes discussed.

### **Confidentiality of e-mail addresses**

Staff outlined the legislation proposed in the Second Regular Session that designated as confidential e-mail addresses in the possession of the Department of Inland Fisheries and Wildlife. The proposal was contained in LD 1651, *An Act to Clarify and Amend Laws Pertaining to Licenses Issued by the Department of Inland Fisheries and Wildlife*. The bill was referred to the Inland Fisheries and Wildlife Committee and the confidentiality proposal reviewed by the Judiciary Committee. Although there was significant discussion about e-mail addresses, and the possibility of providing an "opt-in" version, the bill was ultimately indefinitely postponed by the Legislature. The Judiciary Committee then asked the Right to Know Advisory Committee to review the issue. Staff explained that other jurisdictions have dealt with e-mail addresses through general privacy act-type legislation, although Texas law does designate such information confidential when it is provided by a member of the public for the purpose of communicating electronically with a governmental body.

The Subcommittee's discussion compared e-mail addresses with traditional mailing addresses. Bob Devlin expressed the view that an address is an address, and the transaction is a governmental transaction; mailing addresses are public, so it follows that e-mail addresses would be public, also. Shenna Bellows disagreed, identifying e-mail addresses as an entry point to individuals' private computers, making them susceptible to Denial of Service attacks, SPAM and other malevolent actions. Personal information could be accessed. The need is to know about how governmental actors are responding; e-mail addresses can be kept private without diminishing access to government. She noted that e-mail addresses are used by political opponents to target ordinary people via e-mail. Judy Meyer recognized the harassment concern, but pointed out that very often an e-mail address is the only identifying information about a person engaging in correspondence. It is simple enough to delete e-mail you don't like.

The Subcommittee agreed that any policy adopted should apply across all agencies. Mr. Spruce requested that Staff identify resources that can explain the practical implications of action on this question. Phyllis Gardiner noted that requiring private e-mail addresses

to be kept confidential by all agencies might involve significant costs which should be explored.

The Subcommittee tabled the discussion to be continued during the next meeting. Staff will contact the Office of Information Technology and other sources for assistance.

### **Next meetings**

The Subcommittee's next meeting is scheduled for Monday, July 12, 2010, starting at 1:00 p.m. The agenda will include continuation of the topics discussed at this meeting, as well as looking at the scope of review for both existing and proposed public records exceptions, penalties for violations and whether the law should specifically mention caucuses with regard to open meetings.

A third Subcommittee meeting is scheduled for Monday, July 19, 2010, starting at 1:00 p.m.

The meeting was adjourned at 3:01 p.m.

Respectfully submitted  
Carolyn Russo  
Peggy Reinsch  
Staff, Right to Know Advisory Committee

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